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Utah Copper Company v. Hays Estate : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

INDEX

INDEX - - - (Continued)

INDEX - - - (Continued)

INDEX - - - (Continued)

STATUTES

TABLE OF CASES

INDEX - - - (Continued)

TABLE OF CASES - - - (Continued)

INDEX - - - (Continued)

REFERENCES

IN THE

Supreme Court

of the

STATE OF UTAH

UTAH COPPER COMPANY,
a corporation,
Plaintiff and Respondent.

vs.

STEPHEN HAYS ESTATE, Inc., a corporation of Utah, JULIA HAYS HOGE, STEPHEN J. HAYS, LAWRENCE J. HAYS, MRS. LOU GOREY, MRS. ETHEL V. REILLEY and MARY LOUISE O'DONNELL,
Defendants and Appellants.

Case No. 5302

Respondent's Brief

I

STATEMENT

Plaintiff is the owner of extensive mining properties in Bingham Canyon, in Salt Lake County, Utah,

and is engaged in operating them as an open-cut mine. By the complaint in this cause it is alleged that plaintiff must remove from its mining claims large quantities of low-grade ores or overburden whereby to disclose the commercial ores below and make them available for mining and shipment; that the low-grade ores or overburden so removed must be dumped upon the surface of adjacent lands in gulches or depressions in close proximity to the mining claims from which they were taken and from which the commercial ores are to be extracted; that plaintiff had accordingly dumped immense quantities of such material upon a large area in Dixon Gulch owned in fee by plaintiff, and that that material contained small quantities of copper in carbonate and sulphide form, in the aggregate amounting to many millions of pounds; that such copper becomes soluble in water after having been exposed to the action of the air and meteoric waters; that the dumps in Dixon Gulch, like all the others of similar material, due to the accumulation of snow and the rain falling upon them, collect, retain and become saturated with moisture, retard and equalize the run-off, and a portion of the copper in the dumps is held in solution in the waters within, and percolating through the dumps, and such copper so held in those solutions may be precipitated and recovered commercially. It was further alleged in the complaint that before the copper could be precipitated from the solutions, the latter must be collected and conveyed through pipe lines

to a precipitating plant plaintiff had constructed for that purpose.

Dixon Gulch is funnel-shaped, widening at the top and becoming very narrow as the gulch nears the bottom of Bingham Canyon, and it has an average slope of 26 per cent. (Tr. 166.) Plaintiff is the owner in fee of that part of Dixon Gulch where its dumps are, and thence upwards to the top of the watershed. Immediately below the dumps is the Bingham & Garfield Railway fill, only partially upon defendants' property and which occupies the space between plaintiff's dumps in Dixon Gulch and the point on bedrock in Tract C where the plaintiff diverts the solutions with which we are here concerned into plaintiff's pipe line and thence to plaintiff's precipitating plant. Almost the whole of the surface of this area between plaintiff's dumps and plaintiff's intake is occupied exclusively by the Bingham & Garfield Railway Company for its railroad purposes, for the most part upon land whereof plaintiff is the owner of the fee, the remainder in part under a decree of condemnation and in part by conveyance from the defendants' predecessor in interest. The copper solutions, however, continue on down the gulch on and above bedrock through and beneath the railroad fill to plaintiff's intake on Tract C, where they enter plaintiff's pipe lines and are conveyed some distance down Bingham Canyon to plaintiff's precipitating plant. The

railway company's easements across that part of Dixon Gulch between plaintiff's property and plaintiff's intake are for railroad purposes and do not include the right to convey over that area these copper solutions for mining purposes, and because the defendants declined to grant to plaintiff the right to convey these solutions across this tract through and under the railroad fill, plaintiff, to preserve its property in the solutions and the copper they contain, was compelled to institute this suit to condemn that right, subject to the railway company's easements, limiting its use to the surface in its natural condition, without any right to enter or penetrate beneath the surface or to disturb the condition of the surface. By a writing introduced in evidence in this case (Exhibit 11, Tr. 60) Bingham & Garfield Railway Company consented, so far as its interest permitted it to consent, to plaintiff's use and occupation of this surface for that purpose.

Plaintiff's intake was constructed upon Tract C and consists of a short tunnel driven just beneath the top of bedrock, from the face of which branches are constructed to the right and left that penetrate upwards through the top of bedrock and into the railway fill, thus intercepting all the copper solutions as they flow down the gulch on and above bedrock from plaintiff's dumps. Tract A is for a pipe line that conveys similar copper solutions from plaintiff's dumps farther up Bingham Canyon. Tract B is for a portion of

a pipe line that conveys to plaintiff's precipitating plant the solutions carried by the pipe line in Tract A, as well as those from plaintiff's dumps in Dixon Gulch intercepted at plaintiff's intake on Tract C. The remaining tract condemned was Tract G, for the construction and operation of an electric transmission line. When it came to the proof, defendants did not contest the condemnation of Tracts A, B and C except wherein Tracts B and C were to be used for the purpose of collecting and conveying away that part of the copper solutions in Dixon Gulch that flow through the railroad fill near the toe thereof at a point the defendants have named the "Hays Spring." But Tracts B and C are required for the collection, diversion and conveying away of the copper solutions in Dixon Gulch the defendants concede to the plaintiff, so on the proof defendants do not contest plaintiff's condemnation of any of Tracts A, B or C. Defendants do not contest the condemnation of Tract G. Accordingly we are concerned upon this appeal only with plaintiff's right to condemn Tract D.

With the filing of the complaint there was instituted a very simple condemnation suit for purposes within the express provision of the statute. But by their several answers the defendants set up a novel defense. The defendants alleged in their answers that while title to the copper solutions produced by plaintiff's dumps was in plaintiff when on and within plaintiff's property, that when those solutions had sunk into the earth and

passed from plaintiff's property and been commingled with the waters within adjacent property and the subterranean waters of the earth, and had become lost, that then they ceased longer to be the property of plaintiff and became the property of the defendants when upon or within the defendants' property—which is a conclusion of law we are not inclined to dispute. But defendants further alleged that defendants owned the lower extremity of Dixon Gulch wherein is located Tract D, and that defendants' property had within it valuable copper waters, much of which arose therein in the form of springs flowing the year round, and that such copper waters had existed therein from time immemorial; that defendants' property was highly mineralized with valuable ores containing copper and other minerals, beneath which were springs, which, together with waters from rain and melting snow and waters percolating in the defendants' property from the surrounding country, took up, absorbed and leached out, the copper values in such copper-bearing ores in place; "that great quantities of the waters containing copper in solution upon defendants' property in said gulch owned by defendants arise to the surface in the form of springs thereon," and that it was defendants' purpose to collect those waters and themselves precipitate the copper therefrom for defendants' own use and disposition. Accordingly the defendants prayed that plaintiff's complaint be dismissed, because the law gave plaintiff no right

to condemn easements over defendants' property to facilitate plaintiff's appropriation of defendants' copper waters, or in lieu of such dismissal, that the defendants have judgment for the value of the copper waters they claimed, which value they alleged was "upwards of $200,000.00."

The case came on for trial and the court below, the late Morris L. Ritchie sitting, upon plaintiff's objection refused to impanel a jury until the plaintiff's right to condemn had been determined, and accordingly the parties proceeded with their proof upon the preliminary conditions stated in § 7333 Compiled Laws of Utah 1917 as follows:

> "Conditions precedent to condemnation. Before property can be taken it must appear:
>
> "1. That the use to which it is to be applied is a use authorized by law;
>
> "2. That the taking is necessary to such use.
>
> "3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

Defendants excepted to the court's ruling because they were thereby deprived of a jury trial upon the question of title to the copper solutions, an issue that defendants' counsel insisted was "the paramount issue here" (Tr. 15.) Defendants persisted in their refusal to admit the obvious characteristics of this condemna-

tion suit. Defendants refused, and they apparently still refuse, to recognize the fact that plaintiff does not seek by this action to acquire any copper solutions it does not own, and accordingly plaintiff cannot by this action be made to respond in damages by way of a purchase price for copper solutions, if any, of which defendants are the owners. Were it to have been found that defendants instead of plaintiff owned the copper solutions plaintiff sought to convey over the easements across Tracts A, B, C and D condemned in this action, then this suit would have been dismissed, but defendants' concessions on the proof deprived them of that defense. Defendants' persistent failure to appreciate the purpose of this suit, and instead to inject into the issues that of title to the copper solutions and the value thereof as an element of damages to be recovered by defendants herein, is responsible for the excessive length of the record and the immense amount of time consumed in the trial of these preliminary issues. Plaintiff's case was covered by a trifling number of pages of testimony. For instance, its direct examination of plaintiff's witness Earl (Tr. 30 to 62) covered thirty-three pages of the transcript, but this witness was subjected to a cross examination (Tr. 63 to 168) of one hundred six pages. The plaintiff's direct examination of its witness H. C. Goodrich (Tr. 290 to 310) covered nineteen pages, but this witness was subjected to a cross examination (Tr. 310 to 412) of one hundred two

pages; all for the obvious purpose of putting on defendants' case through plaintiff's witnesses. There are nearly four thousand pages of testimony in this case, the whole of which relates only to the issue of title to the copper solutions. Not one page of that record is directed to the issue of damages, the ultimate issue in a condemnation suit. The parties stipulated to the damage sustained by the defendants for the value of the easements condemned and damages resulting to the balance of the tract by reason of the taking, at the sum of $500.00, the amount offered defendants by plaintiff before this suit was begun. (Tr. 3874). The defendants appealed because the court below allowed them nothing for the copper solutions, finding that the plaintiff and not the defendants was the owner of those solutions. While the suit as instituted was a condemnation suit, the parties stipulated the only item of damages for which judgment could have been entered in that suit. This prolonged controversy revolves about one issue only, i. e., in whom is the title to the copper solutions. Defendants could with greater propriety have sought the relief they desired by suit to enjoin plaintiff's diversion of copper solutions of which defendants claimed to be the owners. This has, in our opinion, a conclusive bearing upon plaintiff's right to its costs incurred in the trial below, and will be again referred to in the discussion of that issue.

When the Bingham & Garfield Railway Company

constructed its railroad across Dixon Gulch something more than twenty years ago, certain of its engineers feared that with the occurrence of cloud-bursts, the torrents rushing down that gulch might wash out the railroad fill, notwithstanding the open and drain-like character of its construction, so to provide an abundant factor of safety, a drain tunnel was driven through the solid rock beneath the right of way, both portals of which were in Dixon Gulch on the northerly side, the upper above, the lower below the railroad fill, and from the upper portal a flume was constructed around the northerly side of the gulch above the fill by which to intercept a part of the run-off from above and divert it through the drain tunnel again into Dixon Gulch, but below the fill. With the making of plaintiff's dumps in Dixon Gulch, extending from high up in the drainage area down to and against the railroad fill, all danger from cloud-bursts ceased, for the dumps, like a sponge or reservoir, absorb such precipitation, however torrential, and release it so gradually as to cause no damage. But as plaintiff's dumps gradually became saturated with the waters accumulated from precipitation upon them, a part of those waters followed the flume or channel constructed along the northerly side of Dixon Gulch to the upper portal of the drain tunnel, thence through the drain tunnel and out the easterly or lower portal, thence over the railroad fill and

into plaintiff's intake on Tract C. When it became apparent in the course of the trial below that the defendants were claiming every little pool of copper water on the surface that had spilled over from the drain tunnel, plaintiff piped that part of the copper solutions from the drain tunnel to its intake on Tract C, whereby to dry up the little pools of copper water that had been created by the spilling of the solutions from the easterly portal of the drain tunnel. Defendants apparently do not claim any of the copper solutions that flow through the drain tunnel and thence into plaintiff's intake. Their effort has been so concentrated upon the other flow in the bottom of the gulch denominated the "Hays Spring" that one may lose sight of the fact that an equally large flow comes out of the drain tunnel, is intercepted in the same intake and diverted and conveyed away through the same pipe lines for which a right of way has been condemned in this action. When, therefore, mention is made of Dixon Gulch waters, title to which is claimed by the defendants, it is only the so-called "Hays Spring" copper solutions that are referred to.

It must be further borne in mind that it is not the contention of either party that any of the waters of Dixon Gulch are public waters or capable of appropriation. What little water there was in Dixon Gulch before the making of plaintiff's dumps there, plaintiff acquired by arrangement with Jerome Bourgard and

J. W. Oddie, the original appropriators. The defendants never claimed any right to any of the waters of Dixon Gulch by reason of appropriation or the devotion thereof to any beneficial use. The defendants frankly admit that it is not the waters they want, but that instead it is only the copper content in those waters that is of value, and the copper only is the thing to which they are trying to establish title. The defendants employ the waters only as a convenient vehicle for that purpose, treating the copper solutions as percolating water rather than as the product of plaintiff's industry. Their whole case is an effort inaccurately to apply to the copper solutions here involved the law of percolating waters whereby to defeat plaintiff's effort to protect its property in these solutions produced by plaintiff's industry and investment, and if successful, themselves to acquire the fruits of plaintiff's effort and discovery without contribution of any character on the part of these defendants.

We here insert a copy of plaintiff's Exhibit 19, which is a photograph taken from an airplane of plaintiff's mine and a part of its many dumps from which copper solutions flow and are collected, diverted and conveyed away to plaintiff's precipitating plant. The canyon in the middle of the photograph is Bingham Canyou, branching to the right into Carr Fork and to the left into Upper Bingham. Plaintiff's mine is an amphitheatre in appearance, and occupies the upper central

portion of the photograph. Certain of the dumps of overburden and low-grade copper ores removed from the mine are shown on each side of the mine, and the names of the several gulches in which those dumps have been deposited are indicated by initials in red. For instance, on the right side of the photograph the first dump from the bottom is Dixon Gulch and is so indicated. The gulch at the bottom of the photograph, immediately below Dixon Gulch, is Markham Gulch, into which dumping had not been started when the photograph was taken. The dump in Dixon Gulch was then in its first stages merely, but the photograph shows clearly the enormous capacity of Dixon Gulch for the further dumping of material there. It also shows the extent of the Dixon Gulch watershed, its broad expanse at the higher elevations, its exceedingly narrow mouth near the bottom of Bingham Canyon at plaintiff's intake, and the very steep grade (an average grade of 26 per cent) traveled by the copper solutions made within the dumps and intercepted by plaintiff's intake at the toe of the railroad fill. The easterly boundary line of plaintiff's property in Dixon Gulch is the westerly boundary of the defendants' property, and strikes across the gulch at a point easterly of the railroad tracks and somewhat down the easterly slope of the fill, as delineated on the photograph by the white line, which shows the relatively small portion of the railroad fill upon the defendants' property. One looks to the south when looking at the

photograph; to the right is west, to the left east. The plaintiff is the owner in fee of the whole of Dixon Gulch from plaintiff's easterly boundary to the very top of the Dixon Gulch watershed, and hence plaintiff is the owner in fee of the entire area upon which the Dixon Gulch dumps and the greater portion of the railroad fill are located.

II

ARGUMENT

(A)

Point

By this action plaintiff seeks to condemn merely an easement to conduct across Tract D into plaintiff's intake on Tract C a part of the copper solutions originating in and flowing from plaintiff's dumps in Dixon Gulch, of both which dumps and solutions plaintiff is the owner. By the exercise of the easements condemned only such solutions will be intercepted or diverted. There are not now nor were there at any other time any other copper waters or solutions arising upon or flowing or existing within either Tracts C or D.

(1)

Point

The lay testimony upon the fact capable of observation and observed.

It is the alleged copper solutions of this vagabond thing the defendants have erroneously termed the "Hays Spring" that are the bone of contention in this controversy. That is not a spring. The waters flowing down Dixon Gulch after the construction of the railroad fill

of course passed through the fill and emerged from the downward slope of the fill, but we know of no definition that would permit us to term that a spring. Water emerged from the railroad fill whenever there was any water flowing down Dixon Gulch because it could not do anything else. The point at which that water emerged was the situs of what the defendants term a "spring," but the location of that spring changed with the changing downhill slope of the fill. Ever since 1910 the bottom of Dixon Gulch has been covered by the railroad fill, which has been enlarged upon certain occasions, each time covering a greater area in the bottom of the gulch, but with the possible exception of the defendant Stephen Hays, no witness has been produced who testified he ever saw a spring in the bottom of Dixon Gulch either before or after the construction of the railroad fill, either at the present location of this "Hays Spring" or at any other location within the defendants' property up or down Dixon Gulch.

Defendants state at page 4 of their brief that "Most of the surface waters and much of the underground waters in Bingham have for many years shown copper content. * * * For a number of years both the defendant and its predecessors * * * have sampled the waters in Dixon Gulch with a view of ascertaining whether it would pay to treat these waters for copper." There is no evidence in this case upon which to substantiate this statement. On the contrary, the evidence is

that the only waters in Bingham Canyon that have a copper content are those issuing from the plaintiff's dumps. There is no evidence to indicate the defendants knew the waters of Dixon Gulch contained copper before plaintiff entered upon its negotiations for the easements condemned.

The whole purpose of defendants' case wherein weeks were consumed was to prove that there was a spring, within the correct definition of such, upon Tract D, and that the copper solutions, except those flowing through the drain tunnel, were supplied by that spring, and that inasmuch as a spring is a part of the realty and hence owned by the owners of the fee, that part of these copper solutions is the property of the defendants, and that therein the plaintiff has neither interest nor title. Defendants failed miserably in their effort and have now apparently abandoned their case with the statement that it makes no difference from where the copper solutions come, because the copper solutions at the Hays Spring belong to the defendants anyway, putting themselves just where they were upon their motion for a non-suit at the conculsion of the plaintiff's case very early in this proceeding, a motion Judge Ritchie unqualifiedly denied after some two days of argument and deliberation. This geologic fantasy of the Hays Spring was a creature of the defendants' ingenuity, and certainly at the time of trial the defendants thought it vital to their case, or they would have re-

frained from so expensive an experiment. It is our opinion defendants were correct in their first conception of the necessities of their case—proof of the existence of the Hays Spring was vital to their case. An issue of such importance is not to be disposed of by a mere assertion of the fact without any effort whatever to substantiate it, accompanied by the statement merely that it makes no difference whether the fact be true or false. We construe that assertion as an abandonment of their case, but lest this court shall not construe it such, we have concluded it our duty to review the testimony upon which the court below found against the defendants.

The defendant Stephen J. Hays testified as follows: (Tr. 928).

> I can't say that I or my family ever made any use of the waters of Dixon Gulch. I never used any of the waters in that gulch nor did my father to my knowledge. We have no use for the waters now; it is the copper in the waters that we seek.

Such being the avowed purpose of these defendants, one's immediate effort in determining the source of the copper waters is to ascertain whether or not there were any copper waters in Dixon Gulch before the railroad fill and the plaintiff's dumps were made there; and with relation to the Hays Springs, to ascertain whether or not before the construction of the railroad fill there was a spring on Tract D when the bottom of Dixon Gulch

was free from obstruction. The railroad fill was made in 1910, broadened in 1914, and plaintiff began dumping in Dixon Gulch in January of 1926. Accordingly plaintiff called to the witness stand men who had lived in Bingham and were acquainted with Dixon Gulch and the water occurrences there before 1910.

Among such witnesses was Dr. A. L. Inglesby, who practiced his profession of dentistry in Bingham from 1899 until 1920, married a daughter of Mr. Jerome Bourgard, who for many years lived and operated a butcher shop in the immediate vicinity of the mouth of Dixon Gulch. Dr. Inglesby's knowledge of Dixon Gulch and the water occurrences there prior to 1910 was positive and precise, corroborated by nothing less than three interesting photographs taken by or of him some time between 1899 and 1906. (Ex. 31 and 32, 30 and 33, and 34 and 35.) Exhibit 30 was taken in the narrow mouth of Dixon Gulch that is now covered by the railroad fill and at a point below where the Hays Spring is supposed to be. (Tr. 528-9). The bottom of the gulch appearing in that photograph and from there on up the gulch three hundred feet or more to certain placer workings was on barren solid rock. (Tr. 534). Exhibit 30 was taken in the summer. Dr. Inglesby called attention on Exhibits 31 and 32 to a shadow-like structure on a ledge appearing in the upper center of the photograph upon which he placed a cross in red, and wrote the word "tank." He described that tank

as one into which the waters of Dixon Gulch were diverted from a point some three hundred feet up the gulch just below the placer workings, and conveyed from that tank into Mr. Bourgard's home, butcher shop and into the Bingham Hotel for drinking, cooking and all other culinary uses; and the witness recalled that Mr. Bourgard watered some ten head of horses from these waters (Tr. 535 to 538), and that a man named Shirk and a colored man sold the waters from Dixon Gulch on the streets in Bingham for drinking purposes. The witness testified that he bought this water and paid $2.00 a month for a bucket each day, and at times when the men did not deliver it he had to go to a point below that wooden tank and from the overflow fill his bucket himself; that that was where Shirk and the colored man got the water they peddled in the town for drinking and other like uses. (Tr. 541). And the witness testified that the photograph (Exhibit 30) was taken at a point in the bottom of Dixon Gulch immediately below the wooden tank on the ridge (Tr. 529), and when that picture was taken the gulch was dry at that point, which "was the usual condition during the summertime" for a distance of about three hundred feet (Tr. 535) up to the point where Mr. Bourgard and Mr. Oddie took the water into their pipe line. (Tr. 539) "When it rained it was wet; when it didn't rain it was dry."

Mr. Herman Harms, State Chemist for the State of Utah, testified (Tr. 662-663):

> Ordinary water used for drinking purposes should be absolutely free from copper solutions and other metallic substances. On the other hand, a certain limit has been established, and that is, practically speaking, one-tenth of a grain of copper or lead or the other metallic substances like zinc per gallon of water, i. e., 1/70 or .0143— of a pound per one thousand gallons of water. If one were to drink water containing in solution a larger quantity of copper, vomiting or nausea and vomiting would be bound to occur. The effect upon the stomach of drinking such water, if it could be retained, would be to irritate and injure the mucous membrane and cause ulcers, spots and similar abnormal conditions.

Dr. F. E. Straup, a physician and surgeon who had resided in Bingham and practiced his profession there ever since 1896, testified much as had Dr. Inglesby to the sale upon the streets of Bingham of the Dixon Gulch waters from the wooden tank for culinary purposes (Tr. 581), and that that water was good drinking water. Dr. Straup recalled also where the water was taken out of Dixon Gulch for the wooden tank, which he testified was right in the bottom of Dixon Gulch about three hundred feet up the gulch from the wooden tank. That witness further testified that the bottom of Dixon Gulch was solid rock exposed from the mouth of the gulch up to the intake for the pipe line leading to the wooden tank on the ridge (Tr. 583) and that the gulch below that intake was dry except at times of surface run-off in the spring or when it was raining; that "in the summer-

time there was nothing there; it was all dried." Dr. Straup testified that there were two springs up the gulch far beyond this intake to the pipe line leading to the wooden tank, and other than those two springs he had observed no water in Dixon Gulch in those days. (Tr. 585) On his cross examination, responsive to counsel's questions with relation to the waters that of recent years flowed through the railroad fill, the witness said (Tr. 593):

> I think the only judgment of a man knowing these conditions before as I saw them, would be that, after the fill was there, it was the water that had always come from up the gulch that came down there.

And again (Tr. 602):

> All I know about this whole story is, until that fill was put in there, there was no obstruction to this water coming down there, at all, in the gulch, and during that time this gulch was dry at certain seasons of the year . . . Now when this fill was put in and this pipe line done away with that led to these tanks, there was water began to come down the gulch later on.

A. L. Heaston, whose recollection went back to 1880, testified (Tr. 546) that in the early days they brought water into Dixon Gulch for placer mining by ditches from Markham and Cottonwood Gulches, and from Carr Fork, and that when the placer miners would let the water go from their operations in Dixon Gulch it would wash out the gulch and leave the bedrock and boulders

exposed all the way from the placer workings out to the mouth of the gulch (Tr. 556); that he had seen solid rock in the bottom of the gulch exposed there for two or three hundred feet (Tr. 557). Mr. Heaston testified that the only water having its source in Dixon Gulch was in two springs, one six or eight hundred feet up the gulch from the Bingham & Garfield tracks, and the other still farther up (Tr. 546), that the spring run-off ceased about the first of June; that the wooden tank on the ridge had been built more than forty years ago to supply the Bingham Hotel and others with culinary water (Tr. 548); that that was all the water Mr. Bourgard had until the city water was put in; that the water from Dixon Gulch was used in Mr. Bourgard's butcher shop for twenty-five years (Tr. 551) and that there was no spring in Dixon Gulch down the gulch from the placer workings. (Tr. 554).

John G. Hocking testified similarly to the wooden tank and its waters, and the uses to which the same were put (Tr. 568), and that he had never observed any other waters in Dixon Gulch where the Bingham & Garfield Railway fill and tracks now are, or from there down toward Bingham Canyon; that the water in Dixon Gulch came from up above the placer workings.

Charles Kelly testified that he had gone to work for Mr. Bourgard in his butcher shop in March of 1903 or 1904, and had worked for him for eighteen years;

that he had looked after the diversion of the waters of Dixon Gulch for Mr. Bourgard. That witness testified that in those days the water for the wooden tank on the ridge was taken out of Dixon Gulch at a point just below the placer workings (Tr. 621); that after the railroad fill was constructed across Dixon Gulch there was no more water, and he went up Dixon Gulch to find what the trouble was and found that the railway company was diverting the water to its depot buildings through a two-inch pipe line from up the gulch.

Mr. Frank O. Haymond, General Superintendent of the Bingham & Garfield Railway Company, testified that in July or August of 1911 he had constructed a pipe line from the springs up above in Dixon Gulch over to the Bingham & Garfield Railway depot, station house and bunkhouse, and diverted the waters of those springs from Dixon Gulch accordingly, the water being used for culinary purposes, that Jerome Bourgard complained about his taking the water away from the wooden tank on the ridge, and that the witness, together with H. C. Goodrich and Mr. Bourgard, went up to the springs together, and Mr. Goodrich promised Mr. Bourgard he would keep the water in the wooden tank, which was done by laying a pipe line over the surface from the railway depot buildings down the gulch to the wooden tank, the railway company taking all the water from the springs but supplying Mr. Bourgard at the wooden tank through that pipe line from the depot

buildings. (Tr. 458 to 461). The witness further testified that he had been in Dixon Gulch below the railroad fill "hundreds and hundreds of times," that the railroad fill had not been constructed when he entered the employ of the railway company and that there was then lots of solid rock exposed in the bottom of the gulch below the railroad fill (Tr. 463), and that there was no water in sight below the railroad fill except at certain seasons of the year during the spring run-off, melting snows and heavy rain. (Tr. 464).

L. F. Strobel, a civil engineer, as well as a railroad construction and mining engineer of the broadest experience, entered the employ of the Bingham & Garfield Railway Company in August of 1910, as division engineer in Bingham, at which time the railroad fill had just been started across Dixon Gulch (Tr. 431). The witness testified that at that time he had made certain observations with particular reference to the occurrence of water in the gulch, and that he noted a little trickle of water on bedrock beneath where the lower portion of the fill would be made, which water was being collected and diverted into the wooden tank on the ridge; that there were no springs within that area; that the springs were five or six hundred feet above the railroad tracks westerly of the boundary of defendants' property and within the property of plaintiff; that the water from those springs was being used for drinking and other culinary purposes by the con-

tractors and gangs on the grade (Tr. 435); that Exhibit 30 was a photograph of the lower portion of Dixon Gulch at the lower part of Tract D, which "rises up rather fast and that was all bedrock in there." (Tr. 438)

Harry Bowman testified that in 1915 and 1916 he had sunk the incline shaft shown on the middle of the photograph, plaintiff's Exhibit X, marked "shaft," to the right of Tract D, at which time he was employed by the Montana-Bingham Consolidated Mining Company, which held a lease and option upon the defendants' property. He testified he had been acquainted with Dixon Gulch for twenty-three years. (Tr. 498) His testimony concerning the wooden tank, the diversion of water from Dixon Gulch for that tank, and the culinary uses to which it was applied, was much the same as that of the others to whose testimony we have referred. In the sinking of the incline shaft no water was encountered until he had reached a depth of two hundred feet, when the water rose twenty-five feet in the shaft and remained at that level, from which he concluded that was the ground water level, one hundred seventy-five feet from the surface. (Tr. 514) And the witness testified that where Bourgard and Oddie took their water for the wooden tank was on solid rock (Tr. 504) up Dixon Gulch at an elevation above the wooden tank, but that the water came from the springs up above the placer workings; (Tr. 518) that otherwise

the gulch was dry except when the snow and rain was running off. (Tr. 508-9).

William Robbins testified that he had been employed by the Town of Bingham from 1914 to 1927 as road supervisor and water master, and that a cement dam had been placed below the toe of the railroad fill across Dixon Gulch, and the water passing through the railroad fill backed up against the cement dam and made a pool, where the boys used to swim in the years 1919 to 1922, and that at that time there was vegetable growth in that pool of the same character that he had observed in all other water. And as further evidence that the waters of Dixon Gulch did not contain copper in those days, he testified that the water had had no effect upon the galvanized iron flume that had been constructed to convey the flood waters from Dixon Gulch across the street into Bingham Canyon. (Tr. 2497).

When the several photographs composing plaintiff's Exhibit X were taken, the hillside appeared as there shown, and it was only in the course of the trial that the defendants uncovered two short inclines driven by prospectors so long ago that they had been entirely covered over with surface wash. Their location is indicated by two crosses in pencil in the middle of Exhibit X on a dashed line in blue about two inches above Tract C, as delineated upon that exhibit. They found

the incline nearest the dump, the south incline, filled with water that contained no copper, while the north incline was full of copper water. This occurrence was explained by plaintiff's engineers and geologists as a diversion of non-copper waters into the south incline by a porphyry dyke to which we will later refer, and as a leaking of copper waters into the north incline from the drain tunnel immediately above. The water did not flow from either of these inclines, although there was a seep from the fresh water or south incline so slight as not to be discernible to an observer unless he were standing at that spot, where he could have seen a slight moisture, so slight that it evaporated in a very short distance, never reached the bottom of the gulch and never flowed or trickled down the hillside toward the bottom of the gulch.

Ray H. Kenner, the then Justice of the Peace at Bingham, was called by the defendants to testify to the water occurrences in Dixon Gulch before the railroad fill was constructed, and he testified that in 1896 he was prospecting and put in three or four hours working in Dixon Gulch in the vicinity of the south incline to which we have just referred. He testified that then the south incline was full of straw-colored water, but that that was the only place he had observed on that ledge (hereafter called the "sulphide vein") where there was actually water accumulated. (Tr. 1235) That sulphide vein or ledge is the place in the bottom of

Dixon Gulch where the Hays Spring, according to defendants' contention, is supposed to bubble up from depth, but Mr. Kenner in his prospecting confined himself to forty or fifty feet either way from the south incline (Tr. 1231), evidently because the south incline was the only place where he could get water to wash his gravel—he carried his gravel to the south incline, not to the bottom of Dixon Gulch. (Tr. 1230) The witness testified there was no water coming out in Dixon Gulch under where the railroad fill now is. (Tr. 1222) This witness also testified that water flowed down Dixon Gulch from under the toe of the railroad fill in 1913, and that the water then was clear, and did not have the color of the water in the gulch today. The witness selected Exhibit 44 as indicating the character of the water flowing in the bottom of Dixon Gulch in 1896, the water at that time being clear, potable water. The witness selected Exhibit 41 as indicating the straw-colored water of the south incline, which he testified "had a slight iron tint to it." (Tr. 1229)

In addition to Mr. Kenner, the defendants called four witnesses upon this phase of the testimony, Ammon B. Stringham, Thomas Stringham, Richard D. Connary and the defendant Stephen J. Hays. The Stringhams testified to the water in the north and south inclines, and while they were as liberal as possible in estimating the quantity of water in those inclines in the old days, still their testimony was not far out of line with that

of Mr. Kenner or with our present knowledge on the subject, i. e., that the only water in Dixon Gulch on or out of this sulphide vein from which the defendants contend the Hays Spring has its source was from the north and south inclines, which water is not now and never was tributary to the waters in the bottom of Dixon Gulch as they emerge from the toe of the railroad fill called the Hays Spring, or however otherwise identified. Mr. Kenner and the two Stringhams testified that the water from the short incline tunnels was not good drinking water, a fact of which we are presently aware, but that the drinking water was that which went into the wooden tank. The defendant Hays and his witness Connary were in a class by themselves. Their testimony was so obviously prejudiced and contrary to the fact, so opposed to all other testimony in the case, as to be worthy of very little consideration. For instance, the witness Connary testified with relation to the waters of the so-called Hays Spring in the early days as follows:

> * * * I observed the character of the water. It seemed to have quite a lot of acid in it all the time there, that is, when I first was there, in about 1890. That was when it was coming out of the rock ledge. After the B & G fill was put in, there appeared to be considerable acid in it about like it was before. The water looked pretty much the same as it does now. We couldn't use it; some of the boys tried to fill their carbide lamps there and they

would have tins to dip this water and in a short time the tins would be full of holes. (Tr. 973).

The defendant Hays testified to substantially the same effect. That testimony is opposed to that of some thirteen other witnesses, three of whom were for the defendants. Moreover, that water was being diverted into the wooden tank, from which it was used for culinary purposes for many years. Plaintiff's witness G. C. Earl described the Bourgard and Oddie intake (Tr. 2286 to 2291) and testified to a survey made under his supervision in September of 1912, whereby was definitely located the then intake for the Bourgard and Oddie pipe line to their wooden tank on the ridge, the original notes of which were introduced in evidence. (Tr. 2125 to 2132, Exhibit 83) Mr. Earl platted upon Exhibit VI the toe of the railroad fill and the Bourgard and Oddie intake as they existed in September of 1912, together with the pipe line and wooden tank, and testified that in September of 1912 there was no water flowing in the bottom of Dixon Gulch below that intake; that bedrock was exposed below the intake in the bottom of the gulch at the time of that survey, and that the water to which the defendant Stephen Hays and his witness Connary had testified was copper water then and prior thereto the source of the waters of the Hays Spring, would have flowed (if there had been any such) into the Bourgard and Oddie intake and thence into the wooden tank and would have been

devoted to the culinary uses already described.

Mr. Earl testified that in October of 1912 plaintiff had made a complete diversion of the Dixon Gulch waters at the springs above the railroad tracks and above the placer workings, and that thereupon the flow at the Bourgard and Oddie intake dried up. (Tr. 93 and 2344) In July of 1915 (Tr. 202 and 2145) the Bingham & Garfield Railway Company and plaintiff secured other water for their uses above the railroad fill and no longer diverted the Dixon Gulch waters at the springs above the placer workings, whereupon the water again flowed through the railroad fill at the toe in the bottom of Dixon Gulch wherever that toe may have been, the location of the toe of the railroad fill varying with the widening and sloughing off of the fill. This witness testified, however, that on March 12, 1915, there was no water flowing at the site of the so-called Hays Spring (Tr. 2300), fortifying his recollection by the drawing on Exhibit 85 made at the time. Mr. Earl's elucidating testimony continued as follows:

> I designed the cribbing appearing in the lower portion of Exhibit No. 24. The actual work in connection with this cribbing was done in picking out this particular location for this cribbing and deciding upon its construction * * during the spring and summer of 1915. * * * I made surveys with relation to that crib design. The survey was made on March 12, 1915. I was there during the entire time it was made. The

> cribbing was constructed just * * up the hill from the concrete dam which is shown upon exhibit 6 and marked 'concrete dam.' * * * (Tr. 2135) * * The rock wall was there at the time. This cribbing was along the line of the gulch 225 feet below the sulphide ledge as it is projected across the bottom of the gulch. The cribbing was constructed on bedrock. * * *

And after identifying Exhibits 84 and 85, the original field notes and plat of that survey, and explaining the purpose the cribbing was intended to serve, continued:

> * * * Bedrock is shown on the plan, also on the section 'solid rock channel' has been written with arrows indicating its extent as disclosed by that survey. That was bedrock. It is also shown on the section and written—with the words written along the bottom of the gulch and reading, "Bottom of gulch, solid rock." At the time this survey was made we had just completed the construction of the track 4 the previous year, that would be in 1914, and had enlarged Bingham & Garfield Railway yards on the outside of the down canyon, the east slope. (Tr. 2141) * * * this plan also shows the toe of the railroad fill on the date of that survey March 12, 1915. At the date of my survey the railroad fill had not reached the rock wall except that one corner, the southerly corner. * * * At the time this survey was made I examined closely the bottom of that gulch in order to determine the proper kind of construction to put in, in order to prohibit any fill material from going down into the flume or canyon, and at that time there was no

water whatever appearing upon the channel of (Tr. 2142) that gulch. The water from the streams up above the railroad tracks was still going into the Bourgard and Oddie tank which was on the ridge. * * * This water was being diverted up in the concrete reservoir * * * above the Bingham & Garfield railroad yards through a pipe line, some of it being used in the buildings of the Bingham & Garfield Railway above and enough was permitted to run down to keep the Bourgard and Oddie tank supplied which was on the ridge just above this point shown on this exhibit 85. The pipe line was constructed in 1912, some two and a half years before. When I made this survey in 1915 this water was conveyed to the Bourgard tank through that pipe line. (Tr. 2143) All of the water except in flood seasons in Dixon Gulch above the railroad tracks was collected in the concrete reservoir and was carried through the pipe line, none of it being permitted to come down the bottom of the gulch, this pipe line furnishing the water to the Bingham & Garfield railway buildings and also to the Bourgard and Oddie tank. * * * The complete diversion was begun in the summer of 1912, I can't state exactly what time, I know it was before the 18th of September and it was completed within four or five days after the 14th of October, 1912. (Tr. 2144) The B & G ceased to make this diversion from the waters up above the railroad track in July, 1915.

* * * There is also a ground line shown and a date December 9, 1919. In the four years any matter that had been washed in that came in some way there on top of bedrock and that represents the difference between bedrock and

so-called ground level. When I made those observations there was no Hays Spring. There was a little bit of water encountered in the construction of the concrete dam in 1919, and there was also a little bit of water in the old (Tr. 2146) Bourgard and Oddie diversion pipe line up above in the gulch. The pipe line which Bourgard and Oddie had used to divert the water in 1912 was * * * still intact,—the part going underneath the Bingham & Garfield railway fill, the place where it entered into the fill was still intact for a short distance out on the side hill. In 1919 there was a little bit of water coming out through this pipe line. I remember particularly because we tried to use that water for mixing the concrete in the construction of the concrete dam and there was not sufficient there to mix the concrete. At one time in the construction of * * this concrete dam we connected onto that old Bourgard and Oddie pipe line and piped the water down to the dam site but later we had to extend the pipe line up to the Bingham & Garfield railway yards in order to get sufficient water to mix the concrete. That was in 1919; the pipe line leading from the concrete reservoir in Dixon Gulch above the Bingham & Garfield railway fill had been disconnected and the water permitted to run down the bottom of the gulch. (Tr. 2147) The area I have shown on exhibit 85 as a solid rock channel is about 80 to 100 feet below the falls, probably not quite that far, 60 feet would probably be more nearly correct from the bottom of the falls and 80 to 100 feet from the top. (Tr. 2148) The falls were below the sulhpide vein, if projected across the bottom of the gulch,—about 20 feet in elevation below the sulphide ledge or sulphide vein.

I cannot show on Exhibit 6 the toe of the railroad fill in 1916. The last location of the toe of the fill that we have by survey is that small part of it shown upon this last exhibit, which was in 1915; I am referring to exhibit 85. In 1915 the Hays Spring was not then at its present location. Of course, the ground line as shown in pencil on exhibit 85 as result of the survey in connection with the concrete dam in December, 1919, shows that Hays Spring could not have been at its present location. In 1915 the Hays Spring was non-existent. * * *

H. C. Goodrich, the plaintiff's chief engineer testified in part as follows:

* * * During the construction of the Bingham & Garfield Railway there was a man by the name of Bourgard who claimed the waters in Dixon Gulch. The Bingham & Garfield Railway Company, under my supervision, had built a pipe line from a spring in Dixon Gulch, taking all of the waters from a point above the railroad embankment at certain seasons of the year into this pipe line and into their various buildings to be used for domestic and culinary purposes. As soon as that diversion was made, Mr. Bourgard came to me and complained about the Bingham & Garfield Railway Company taking his water. (Tr. 325) This controversy ended in an agreement between Bourgard and the Bingham & Garfield Railroad Company whereby the Railroad Company paid Bourgard $500.00 for any surplus waters in Dixon Gulch and the Railroad Company provided a certain amount of water to flow down Dixon Gulch to Bourgard's pipe line and tank. Now after the pipe line was built by the Railroad Company the gulch below dried up

and there was no water coming out below the railroad fill. * * * The waters that come from the Utah Copper dump during the flood season when there is lots of water will come from the Utah Copper property into Dixon Gulch underneath the railroad fill between bedrock and the bottom of the fill and in the fill itself and at times will flow out of the fill through the soil outside of the fill. (Tr. 328)

I would say that Dixon Gulch is a well defined channel. * * * The entire gulch is a well defined channel. I would say the waters that come through the fill and find their way into tract D come through in a well defined channel. The channel is all of Tract D; they come through everywhere in all of that area. During the low season of the year I believe the particular part of Tract D where they came through is the bottom of gulch, * * * they would also flow through the drain tunnel. Except in the drain tunnel and the bottom of the gulch they would not come through any other place at low water season in commercial quantities. (Tr. 329) * * * I say that in a low water a flow like it is now that substantially all of the water will come through the drain tunnel or come down underneath and flow into the old channel of Dixon Gulch; it will come down the bottom of the gulch. (Tr. 330) * * The spring that comes out below the rock wall that we have been talking about in the bottom of the gulch comes out on top of material in the bottom of the gulch, coming out of the railroad fill. It does not come out of the side of the hill. * * * The water that I saw coming out of the bottom of Dixon Gulch is above the concrete wall and below the rock wall, * * * it was coming out

of the material in the bottom of the gulch from the railroad fill. There is at least 20 feet of railroad fill in there. * * * My idea would be that water is coming down through the railroad fill and finds an outlet on top of the material in the bottom of the gulch below the railroad fill. * * * All of the waters that make in the Utah Copper dump will cross Tract D and come out at the bottom. As to my knowing of any other well defined channel through which waters have come, or would be expected to come, than the bottom of the gulch in Dixon Gulch on Tract D, there is none; there is not any well defined channel that (Tr. 334) any man could possibly figure that water could come out of, in my judgment, in Dixon Gulch, on Tract D. (Tr. 335) * * *

Plaintiff's Exhibit No. 30, which you show me, looks like a photograph of a part of the bottom of Dixon Gulch. If it is a part of the Dixon Gulch at all, it is my judgment that it would be about where the concrete dam is shown in Exhibit 6. That is at the bottom boundary of Tract DY. The concrete dam is the point from which the waters are diverted from Tract DY and taken * * down the raise into the tunnel. I observed the bottom of Dixon Gulch before the railroad fill was constructed across that gulch. (Tr. 416) The photograph Exhibit 30 looks very much like any place in the bottom of Dixon Gulch within probably 40 or 50 feet around where the concrete dam is located, it looks to me as if the photograph were taken below the bend in the bottom of the channel; it is located about 40 feet above the concrete dam. Before the railroad fill was made there bedrock was exposed at that point, as shown in this photograph. From that point on up the gulch bedrock was exposed

> for 150 to 200 feet. I made observation as to the occurrence of water in the bottom of Dixon Gulch and on the sides to the right and left where the railroad fill was subsequently made. I observed there wasn't any water on that part of Tract D that the railroad embankment was placed on other than the water running down the channel, except during the rainstorms and periods of melting snows. (Tr. 417) The water running down the channel is the water to which I have already testified to as having been diverted by Bourgard and Oddie and the Bingham hotel people into this tank and for use in the hotel.

It is not our purpose here to abstract nearly 4000 pages of testimony, but we have tried to refer sufficiently to the testimony to establish this fact,—that there is not now and never was a Hays Spring, that no part of the waters plaintiff is taking into its pipe line from Tract C in Dixon Gulch have their sources in any spilling over the lip of a synclinal basin (the sulphide ledge or vein) or in any other manner arising upon the defendants' premises, but that on the contrary the whole of the waters plaintiff so receives upon Tract C are the waters flowing from plaintiff's dumps in Dixon Gulch, thence through the railroad fill and down Dixon Gulch on and above bedrock and across the premises of defendants to and into plaintiff's intake on Tract C.

(2)

Point

The Geologic Case

Upon that record all the geologists in the world

would be powerless to conjure up a spring on Tract D. It was never our opinion that geologic theory could in any manner assist in the proof of known facts capable of physical observation that had been so definitely observed. When a flow of water down a gulch on bedrock has been observed to cease, when that flow was diverted at its source, recourse to geologic theory by which to determine the source or continuity of that flow or the course pursued by it when not interfered with would be ridiculous. And when by actual observation the fact has been definitely determined that there is not now nor ever was a spring upon Tract D, no amount of geologic theorizing can persuade one to conclude that there is such spring. The defendants, however, attempted that, at a great consumption of time and money, necessitating plaintiff's response by its geologists also, and defendants' geologic case proved as ineffectual as that of its lay witnesses upon the observed fact.

Defendants' experts conceded frankly enough that unless the Bingham & Garfield Railroad fill as interposed across Dixon Gulch became and was an impervious barrier to the descending solutions from plaintiff's dumps, that then the copper solutions from those dumps would not have seeped through the rocks in place into the synclinal basin beneath, but instead would have flowed down Dixon Gulch on and above bedrock as the

culinary waters out of the springs above had done in the old days to the Bourgard and Oddie intake. (Tr. 1329, and 1666 to 1670) There would therefore in their opinion have been no Hays Spring, except in the sense that waters flowing down the gulch on bedrock passed through or beneath the porous material there and again appear farther down where bedrock was exposed. Such was not defendants' conception of the Hays Spring as pleaded nor as manifest by their effort in the course of the trial. Now counsel refuse to define what they mean by the "Hays Spring," contenting themselves with the assertion that it makes no difference what it is, but at the same time contending for all definitions, thereby enjoying a rare liberality of thought and expression accordingly as events may seem propitious.

The only purpose of defendants' geologic case was to define the Hays Spring as the outlet over the lip of the synclinal basin, or out of the sulphide vein, of copper solutions having a broad subterranean source, a spring in the true sense whereof the defendants were the owners because coming to the surface on defendants' property. In doing this defendants' engineers and geologists conceded that it was necessary that there be created and maintained to the copper solutions decending Dixon Gulch on and above bedrock, an impervious barrier in the form of the railroad fill that would effectually block their natural course down this

precipitous gulch on and above bedrock and that would compel them to seep and percolate into bedrock beneath, down into the synclinal basin formed by the massive quartzite ledge that constitutes the foot-wall of the sulphide vein, where defendants' engineers and geologists speculated that those solutions had accumlated, and, commingling with other copper solutions from a large part of the Bingham District, were spilling over the synclinal basin in the bottom of Dixon Gulch beneath the railroad fill within the boundaries of the defendants' property where concealed from view, thus creating the Hays Spring within defendants' domain.

During the progress of the defendants' geologic case plaintiff concluded the porosity of the railroad fill in Dixon Gulch was capable of a physical demonstration, and experiments were made accordingly by James A. Marsh, the mine geologist of the plaintiff company. Before Mr. Marsh had concluded his experiments the defendants made him their witness and proceeded to interrogate him about what he was doing (Tr. 1422) and to put in evidence as a part of their case the information obtained from his experiments so far as then completed. In the course of defendants' examination defendants' Exhibit 64 was introduced. Subsequently when called by plaintiff (Tr. 2501 et seq.) plaintiff's Exhibits 98, 99 and 101 were introduced in evidence and a more complete account given of Mr. Marsh's observations. There were three experiments

planned and completed; the fourth was not planned. They consisted in directing a flow of water upon plaintiff's dump and the railroad fill and recording the results at the so-called Hays Spring and the east or lower portal of the Bingham & Garfield Railway Company's drain tunnel.

EXPERIMENT No. 1:

November 5, 1928, at 1:25 P. M., water turned on Bingham & Garfield railroad fill at point marked 1 and colored blue on Exhibit 100 and marked "water" on Exhibit VII (Tr. 3040) at which time there was a normal flow at the Hays Spring of 3474 gallons per twenty-four hours. Water was turned off at 9:53 P. M. on the same day. The first increase noted in the flow at the Hays Spring was at 8:05 P. M. with a recorded flow of 4633 gallons per twenty-four hours, the maximum at that point being attained at 11:15 P. M. the same day, with a recorded flow of 17,373 gallons per twenty-four hours. There was no change in the flow of the water through the railroad drain tunnel. (Tr. 1454 et seq.) It was estimated that approximately 43,000 gallons of water had been turned on the railroad fill in the course of this experiment. (Tr. 2504).

EXPERIMENT No. 2:

November 6, 1928, at 1:25 P. M. Water was turned on D. Dump approximately at the toe of the G dump where marked on Exhibit VII "more water" and Ex-

hibit 100 "water," and the numeral "2" (Tr. 1428). The water was turned off at 9:00 P. M. The flow at both the Hays Spring and the drain tunnel showed rapid increase. The flow at the Hays Spring at 1:25 P. M. was 6000 gallons per twenty-four hours. The maximum flow was reached at 5:05 P. M. on the same day of 108,000 gallons per twenty-four hours, the first increase having been recorded at 2:30 P. M. with a flow of 61,920 gallons per twenty-four hours.

The flow at the Bingham & Garfield railroad drain tunnel at 1:25 P. M. was 6949 gallons per twenty-four hours. The first increase was recorded at 3:05 P. M., when the flow reached 7721 gallons per twenty-four hours. The maximum flow attained from the drain tunnel was on November 7th, at 12:15 A. M., amounting to 23,164 gallons per twenty-four hours.

It was estimated that approximately 76,500 gallons of water had been turned on D Dump in the course of this experiment.

EXPERIMENT No. 3:

The water was turned on D dump at the point marked 3 on Exhibit 100, two inches to the left of the letter "D" in "D dump," and on Exhibit 52 at the point with rings around it marked "No. 3" with the initials "JA" one-half an inch to the left of the words "dump level," or about forty or fifty feet northerly

from the southerly edge of the plaintiff's dump at that point. (Tr. 2508).

The water was turned on November 21, 1928, at 12:00 o'clock noon in about an average flow of 20,000 gallons per twenty-four hours. At that time the flow at the Hays Spring was 5610 gallons per twenty-four hours. The increase in flow at the Hays Spring began at 10:04 P. M. with a flow of 5915 gallons per twenty-four hours, constantly increasing until the maximum of 12,705 gallons per twenty-four hours was reached at 11:00 A. M. of November 22nd. The water was turned off November 22nd at 7:05 A. M. (Tr. 2525) The Bingham & Garfield railroad drain tunnel showed no increase in flow during this experiment. (Tr. 2534)

EXPERIMENT No. 4:

The point at which water had been turned on the D dump is shown on the photograph Exhibit X in the upper left hand portion of that photograph by a blue line at the bottom of the supply tank. Some time during November 17, 1928, someone, whose identity has never been disclosed, without the knowledge or consent of any of plaintiff's officials, disconnected the pipe line leading from the supply tank, thereby turning upon the dump at that point a flow of approximately 250,000 gallons per twenty-four hours. None of that water came through the Bingham & Garfield railway drain tunnel. (Tr. 2541) A maximum flow at the Hays Spring of

46,328 gallons per twenty-four hours was recorded November 18th, at 1:35 P. M. when the break was discovered and the flow was shut off and the pipe repaired. The Hays Spring flow on November 16th had been 2894 gallons per twenty-four hours. (Tr. 2539)

These experiments speak for themselves and are conclusive against defendants' supposition that the westerly slope of the railroad fill is sealed and that the solutions from plaintiff's dumps are accordingly forced through the railroad drain tunnel. (Tr. 2667) The defendants' witness Crocker, who qualified as an expert civil and mining engineer, testified that the railroad fill was "an effectual dam." "That it stops the flow of water down the gulch." (Tr. 1331) "I don't think there is any water running down the bottom of that gulch." (Tr. 1333) That the railroad fill would create a pond or lake "probably up within fifteen feet of the top of the fill, fifteen or twenty feet, up to where it has been what I term hydraulically sealed." (Tr. 1358) "When I said it was as perfect a dam as a man could construct I meant it." (Tr. 1371) Such testimony is not worthy of comment.

Mr. A. H. Christensen was in charge of the construction of the railroad fill across Dixon Gulch, the work having been done by the Utah Construction Company under contract with the Bingham & Garfield Rail-

way Company. Mr. Christensen was a director and vice-president of the Utah Construction Company. He declined to describe that fill as a "perfect hydraulic dam," but on the contrary described its construction as a "French drain," wherein the largest boulders rolled to the bottom of the gulch preserving great apertures between them to permit the passage of water under and through the fill on down the gulch, and further calling attention to the fact that the fill had been constructed upon coarse placer gravels and boulders, all of which material was exceedingly porous permitting a relatively free passage of water down the gulch. On direct examination Mr. Christensen testified in part as follows:

> I wouldn't define the fill that we built across Dixon Gulch * * * as a perfect hydraulic dam. In the construction of this dam the bottom of the gulch was filled with the coarsest rock we had. (Tr. 2064) * * * The material that went in there was ten per cent of it below the quarter of a cubic foot and about forty per cent was a quarter of a cubic foot to 18 cubic feet, and fifty per cent from 18 cubic feet up. The bottom of the gulch was boulders that came from these placer diggings above, and the fill was made on top of those boulders. (Tr. 2065) As to the character of* * * the natural soil up-gulch from this fill, it was an old placer dump and boulders * * * Farther up the gulch, there was a great deal of oak brush and grass; * * * There was no evidence of erosion on the hillside. * * * I observed the west slope and west

toe of the fill shortly before the Utah Copper Company began dumping there. * * * Three years ago the wash material from Dixon Gulch against the west slope and toe of this railroad fill didn't show any evidence of pooling. (Tr. 2067) * * *

and on cross examination in part as follows:

* * * The drain tunnel was put in, we thought as a safety valve. I didn't think it was needed. (Tr. 2091) We thought we had made a French drain there that would take care of the water without the drain tunnel. I remember that very distinctly. I suppose the drain tunnel was a factor of safety. * * * The French drain or the fill was in the bottom of the gulch. The coarsest rock was put in the bottom. 50 per cent of the excavation was rock and that naturally made the French drain and we tried to make it as open as we could; we tried to as a safety. More than 50 per cent of the entire west portion of the B & G fill was rock, because there was 40 per cent of it loose rock that was open stuff, too. The entire lower portion there is rock. (Tr. 2093) * * *

Assuming that as a matter of fact in 1913 a flood came in there which filled up the lower drain tunnel and filled up the bottom of the gulch and the lower drain tunnel to the extent that the water backed farther, raised back farther to within about 15 feet (Tr. 2099) of the top of the B & G fill, as to whether or not a flood of that character would be sufficient to seal that fill, I would say that it didn't, from my personal knowledge of it. I was doing work there and was up there very frequently and the

> waters that came down there from the gulch at that time while they raised up they very soon disappeared. In addition to that the bottom of that fill or that gulch at the time we commenced there had so much round boulders and other rocks there that it would have to seal that gulch up 150 feet above the fill in order to keep it from running through under the fill. If the residual matter were backed up 200 feet (Tr. 2100) I don't think it would seal it; I think it was a sort of an underground channel all the way down the gulch, where these springs above the fill would go down in two or three places they would come out * * * below. I don't think you could hold water up to the bottom of the fill; * * * all the fines or the silt in that water would be carried through it, it did not stop, * * * would carry it through on the grade like that and it would carry it through the fill and it would carry it on through. (Tr. 2102) I think it would do that forever. I would think that in order to keep away from going under that fill they would have had to dug a cut or a channel there and put a concrete or some kind of puddling or other substantial matter to keep the water from going under it. * * *

The porosity of the railroad fill, including its westerly slope, was subjected to a most convincing test only a few months preceeding January 1, 1926, when plaintiff began dumping in Dixon Gulch. The plaintiff's mine geologist, Marsh, related this experience:

> I was in the court room yesterday morning when Mr. Hyde was testifying to his illustration, plaintiff's Exhibit 107. I lived in the vicinity of this portion of Dixon Gulch from July, 1924,

until about October, 1925. On the right-hand corner of Exhibit 107, marked the Bevins house, that is the house which I occupied during my stay in Dixon Gulch during that period. I lived there in the winter time. I recall the hole as shown in the middle of Exhibit 107, (Tr. 2992) and the portion of the gulch indicated on this exhibit as "Toe of building fill and bottom of gulch." That illustration correctly illustrates that portion of Dixon Gulch as I remembered it in that period from July of 1924 until the late fall of 1925. July 3, 1925, we had a considerable rainfall, the result of which caused a flood; at that time I noticed some water in that hole in the middle of exhibit 107. Due to this heavy rainfall I became rather alarmed at the conditions at the house in Dixon Gulch, so I left the office (Tr. 2993) of the Utah Copper Company at Bingham—that is east of the B & G yards; it would be over in this direction, in the upper left-hand corner of Exhibit 107; and when I left the office, of course I had to pass over the tracks; I generally took a path down around this way—just below the B & G warehouse, and I came down and noticed up on the edge of the railroad fill,—I noticed the water that had collected in this hole. At that time I followed a path that would take me north of the B & G warehouse and in a northerly direction for some distance until intersecting the natural ground, which would be on the lower part of Exhibit 107, about near the point 3; and then in possibly a southwesterly direction, I followed along there, passed by the assay office, which is shown on the right-hand corner of Exhibit 107, and then in a southwesterly direction to the house which I occupied at that time. I observed that the water had risen there to about 15 or 20 feet from the edge of the B & G

> tracks, and after going to the house, I possibly stayed there 40 or 45 minutes, came back the same way; coming back I noticed the water had entirely disappeared. (Tr. 2994) That was a cloud-burst. It had entirely disappeared in between 30 and 45 minutes. I lived there during the spring run-off of 1925. At that time I did not observe any water accumulated to the west of the west slope of the railroad fill. There was just the one time which I have mentioned now having seen any water accumulated there. You ask what happened to this perfect hydraulic dam; it didn't appear very hydraulic to me; seemed rather porous and permitted water any time it entered there to pass through it. * * *

Defendants' geologic case can attain no greater strength than the supposition upon which the defendants have founded it, the supposition that the railroad fill across Dixon Gulch was effectually sealed by the deposit of silt along its westerly slope up to the level of the drain tunnel portal, and thereby became an impermeable barrier or dam to the descending copper solutions from plaintiff's dumps in Dixon Gulch. The obvious failure of this hypothesis, coupled with counsel's emphatic refusal to discuss their geologic case in either brief or argument, forbids our devoting as much space to its consideration as we might otherwise have been impelled to do. We will therefore very briefly describe their effort, and as briefly endeavor to show that the effort failed, not only because of the failure of the hypothesis upon which it was predicated, but because

the defendants' geologic case was wholly ineffectual within itself.

Assuming, for the sake of argument, that the copper solutions could no longer flow down Dixon Gulch to the so-called Hays Spring, defendants' effort was then to supply some subterranean course whereby those solutions, commingled with others, their identity lost, could be brought from depth to the surface in the bottom of Dixon Gulch as a true spring. To supply that course the defendants' geologists spent weeks in trying to prove a synclinal basin the bottom of which was intact and impervious, the lowest point in the lip of which being the very bottom of Dixon Gulch at the so-called Hays Spring, the presence of highly shattered sieve-like quartzite beds beneath the plaintiff's dumps in Cottonwood and Markham Gulches, in addition to those in Dixon, affording an efficient collecting medium for the copper solutions from all those dumps and the spilling of those copper solutions collected from these and perhaps other sources and emptied into Dixon Gulch at the Hays Spring. Of course an expert can easily enough create an imaginary condition suitable to his purpose and may testify to it as a fact, but it is far more difficult to supply the premises from which his conclusions may be deduced. So in the case at bar the dips and strikes of the massive quartzite beds forming this synclinal basin were such as to forbid the conclusion that the synclinal basin underlay Cottonwood

Gulch or could in any possible way collect the waters of Cottonwood Gulch. (Tr. 2618) Instead, the massive quartzite beds of necessity form an impenetrable barrier to the copper solutions of Cottonwood Gulch, for they were actually so tipped up as to form the ridge between Cottonwood and Dixon Gulches. (Tr. 2166, 2815, 2850, 2675, 3018.) Also the Markham dump had just been started, had attained no sizable proportions and was not capable of yielding a solution of any substantial copper content. (Tr. 192, 2678). The shattered quartzite of the less competent member showed no evidence of oxidation and hence the leaching of copper in place was out of the question, (Tr. 2666, 2671, 3017) and this lack of oxidation indicated also that the surface waters were not seeping in appreciable quantities through the rocks to depth. The defendants' geologists then reluctantly conceded that in all probability the copper in the solution at the so-called Hays Spring was that derived from plaintiff's dump in Dixon Gulch, but counsel contended that those solutions had pursued such a devious and unknown course from the dump in Dixon Gulch down into this synclinal basin and thence spilling over its lip into Dixon Gulch that title had passed to the defendants by the time those solutions arose as a spring upon Tract D.

Plaintiff's geologists showed that the axis of this synclinal basin was not in Dixon Gulch at all, but to the south at the Shawmut workings, (Tr. 2611, 2845)

and the defendants' geologist, Dr. Pack, agreed, (Tr. 1741) Then the plaintiff's geologists and engineers showed that this synclinal basin had been punctured directly along its axis by these Shawmut workings, (Tr. 2622, 2779) but that the water encountered carried no copper, (Tr. 2624) and plaintiff's geologists and engineers showed that not only did the Shawmut workings puncture this synclinal basin at its lowest point, i. e., along its axis, but that to the point where those workings so entered it was nearer the plaintiff's dump in Dixon Gulch than was the lip of the synclinal basin in Dixon Gulch, (Tr. 3665, Ex. 100, Tr. 3673, 3677) and that therefore if the copper solutions from plaintiff's dump were getting into this synclinal basin and thence by subterranean courses to the Hays Spring, the water encountered in the Shawmut workings nearer the source of these copper solutions, i. e., plaintiff's dump in Dixon Gulch, should have been at least as strong a solution as that at the so-called Hays Spring, but the waters there encountered by the Shawmut workings carried no copper. From Markham Gulch this basin was penetrated in a number of places and in no instance was copper water encountered. (Tr. 3003) Even in Dixon Gulch on this very sulphide vein on the south incline the water encountered carried no copper; apparently was just as it had been in 1896, when Mr. Kenner carried his placer gravel to that incline to wash it. The copper water in the north incline could have come from

no other source than the plaintiff's drain tunnel, (Tr. 2944, 2946, 2948) convincingly demonstrated by the immediate reduction in copper content of those waters upon the sealing off of the waters in the drain tunnel by the installation of the pipe line and the stopping of leaks in the pipe. (Tr. 2650-2658, 2696, 2702, Ex. 103) Wherever this synclinal basin was punctured or waters were observed to pass from it, the waters encountered or otherwise observed carried no copper.

So it became expedient, if possible, that the defendants abandon their sulphide ledge by which they had previously identified the impervious member forming the bottom of the basin and select another so far up the mountain that the Shawmut workings would have passed beneath it and not into it. (Tr. 3321) The lack of accord between defendants' geologists has been noticeable in this case. Between them they have corroborated almost every observation plaintiff's geologists have made. It is not surprising defendants' geologists should not agree. Mr. Crane hit upon a quartzite ledge way up above the Shawmut workings and above the Bingham & Garfield railroad tracks, which he contended was the sulphide vein; certainly this time he put it high enough up the hill so that the Shawmut workings would not puncture it and encounter fresh water. Then of course he could not get it across Dixon Gulch to connect with that sulphide vein and ledge to which the defendants had irretrievably committed themselves. Mr.

Crane indulged in a wild orgy of strikes and dips by which to bring this new sulphide ledge down to that of the inclines in Dixon Gulch, and Dr. Pack refused to be a party to the Crane effort. Judge McDonough, accompanied by geologists and engineers of both parties, devoted two days to an examination on the ground of all conditions relevant to this controversy, and concluded, as evidenced by his findings, that the location of that sulphide ledge was where Dr. Pack and the plaintiff's geologists first located it below the prophyry sill above the Shawmut workings, and that the Shawmut workings passed through not only the sulphide ledge but the porphyry sill as well, into this synclinal basin.

Mr. J. J. Beeson, one of plaintiff's geologists, described as follows two reservoirs, one of copper solutions in Dixon Gulch beneath plaintiff's dumps, of which the outlet is through the railroad fill and down Dixon Gulch on and above bedrock, and the other of fresh water within the massive quartzite beds comprising the great synclinal basin of the Bingham district. Mr. Beeson's references are to his Exhibit 100:

> The copper waters flowing through the railroad fill at or near the rock wall, that being the point that the defendants have termed the Hays Spring, are not from this sulphide vein. Those copper waters, in my opinion, are merely waters that have come to the railroad fill near the point marked 57, have percolated down through the railroad fill, flowed down the bottom

of the gulch on bedrock or on surface soil in the bottom of that gulch and come out from under the surface wash in the bottom of Dixon Gulch at the point marked 60.

My observations of the flow of waters, not only in Dixon Gulch, but in the Tiewaukee Gulch where a great deal of excavation was actually done right under the dump (Tr. 2661) and I had a good chance to observe the flow of the copper waters—is that within that basin, * * * there is usually a thick mantle of soil * * * black soil and clay, and that surface has been completely sealed. * * *

We have here a large reservoir which is formed by the sulphide vein or the contact between the competent and incompetent member, and that formation has been highly fractured and surface waters have passed into it from the upturned beds, as exposed to the south of the point where I have shown the outcrop, * * * —the section there is highly fractured with northeast southwest fissures. These same fissures would lead down under the bottom of Dixon Gulch at different points; the waters have passed down through those formations and reached the workings of the Shawmut tunnel and flowed out as fresh waters. In the vicinity of Dixon Gulch, the waters that have not been contaminated with the copper water from the B & G drain tunnel, are fresh waters; and so that is my evidence that that reservoir is filled with fresh waters.

Within that reservoir is another one which is the natural surface of the ground as it appeared before the Utah Copper dump was placed there and that surface (Tr. 2662) diverts the flow of copper waters down into the bottom of

Dixon Gulch; they pass down to the railroad fill * * * (Tr. 2663). Then the copper waters percolate through that railroad fill, flow on down the bottom of Dixon Gulch on bedrock and emerge out of the point marked 60, that is, part of the water comes out and a part finds an easy access through the B & G drain tunnel and comes out the portal at the point marked 58. Point 60 is the point that has been called the Hays Spring. If the copper waters * * * pass down into the solid rock below bedrock, * * * seep into the fractured, broken-up quartzite, they would be dammed by the porphyry dike, * * * they would emerge—come out to the surface again at a lower elevation, and the logical place to find those waters would be in the fresh water incline which starts on the sulphide vein about the middle of the porphyry dike, passes through the porphyry dike and intercepts a number of small fissures, and the water coming into that fresh water incline is fresh water. This porphyry dike would act as a barrier or a dam which would not permit the waters to flow down through the solid rock and come out at any spring in the vicinity of the sulphide vein.

The sulphide vein here is also impervious, so we have a low point in the trough at the fresh water incline, (Tr. 2664) and the waters coming out at that point are fresh water, so if any copper was going down into the solid rock, passing through fissures and fractures—and this country is highly fractured and fissured—it would come out in the fresh water incline.

That would also account—the presence of the porphyry dike here acting as a barrier, would account for the fact that the sulphide vein, as

far as we know it, is perfectly dry where it goes through Dixon Gulch to the south of the fresh water incline. (Tr. 2665)

* * * * * *

The significance those fissures had to me with relation to this problem we have under consideration was simply this, that, in the case of this Jersey Blue fissure, it passes right up under the Cottonwood Gulch and comes through the workings of the U & I tunnel, the U & I tunnel is flowing water at the portal and it is quite probable that fissure does carry some of that water at the portal, and that is fresh water there and if there was a migration of that copper water through there it might possibly contaminate this water, which it doesn't; and these various fissures through here, if they served as a channel for waters coming from underneath the Cottonwood Gulch or underneath Dixon Gulch, either one, they would be intercepted by the Shawmut workings of the Shawmut tunnel and the waters flowing out of the mill tunnel would be copper waters. Instead they are fresh waters. There are five fissures shown intercepted by the Shawmut tunnel, and I have also observed a fissure right at the shaft which faults the porphyry sill slightly. That would extend up into that trough also. (Tr. 2759) Immediately above the Shawmut incline shaft the porphyry sill is offset for a distance of about 6 or 8 feet on a fault which is about parallel to the axis of the syncline and that fault would penetrate—it does penetrate the porphyry sill and passes into the rock or hanging wall, and that would have a tendency to drain any waters within that basin over to that point of the hanging wall side of the porphyry sill, and there we observed fresh waters

> also. So that, if those fissures were channels for water either from Cottonwood Gulch into this syncline or from Dixon Gulch into this syncline, and were means of conveying copper water from one place to the other, it would be apparent from the waters in the Shawmut tunnel * * *.

To the same effect is the testimony of plaintiff's geologist Frederick D. Hanson (Tr. 2811, 2815, 2817, 2819, 2939), arriving at his conclusion as follows (Tr. 2821):

> In my opinion there is no other source than the Utah Copper dump in Dixon Gulch for the copper waters issuing from beneath the B & G fill at the point designated as Hays Spring. It is my opinion that those waters from that source find their way to this point designated as the Hays Spring by flowing on top of the surface soil or at least (Tr. 2821) on top of bedrock and not below it.

and the testimony of plaintiff's geologist, J. A. Marsh (Tr. 3009, 3015).

(3)

Point

"These waters had a copper content in 1920 . . . and had a commercial content in 1926 and 1927, three or four years before, according to plaintiff's own evidence, the dumps in Dixon Gulch should give off any solutions," Appellants' Brief, page 26.

The above is copied from appellants' brief at page 26 and relates for the most part to the testimony of

George B. Robbe, a witness called by the plaintiff, who testified October 22, 1928. Mr. Robbe was a mining engineer, the owner of a precipitating plant in Bingham Canyon and was then engaged in the business of precipitating the copper content from copper solutions from McGuire and Dixon Gulches. Mr. Robbe began treating the copper solutions of Dixon Gulch June 19, 1928, (Tr. 481) at which time the copper content in those waters was "a little over twelve pounds per thousand gallons" (Tr. 483) sampled below the railroad fill, but the witness testified that had he not had a precipitating plant already built and in operation, with sufficient surplus capacity, those solutions would not then have been commercial. (Ex. 64) The witness had commenced taking samples of the Dixon Gulch waters in November of 1920 (Tr. 486), when his recollection was that that water showed a trace of copper, that is to say, between .0416 and .0832 of a pound of copper per thousand gallons of water. (Tr. 487) All his samples were taken below the railroad fill. The witness also sampled the Dixon Gulch waters in 1921, 1922, 1923 and 1924, during which period no increase in copper content appeared. In May of 1927, the witness again sampled those waters and obtained a copper content of between eight and nine pounds per thousand gallons. (Tr. 493)

There follows on page 26 of appellants' brief the following:

> The witness Earl gave the history of all Utah Copper Company dumps. Practically all of them remain from six to twelve years before giving off any solutions. He gave as his opinion that it takes four or five years before dumps give off commercial solutions,

and counsel refers us to appellants' abstract at pages 123-124. No abstract can be of much assistance wherein the attempt is made to condense nearly four thousand pages of testimony into five hundred pages of abstract. For instance, at this point the defendants thought it quite unnecessary to include in their abstract the witness' description of the transformation from culinary waters to copper solutions with the dumping in each gulch. We resort directly to the transcript from pages 182 to 196 and one will search there in vain for anything in the testimony to support the statement we have just quoted, that "practically all of them remain from six to twelve years before giving off any solutions." Mr. Earl did not testify as to when the dumps gave off solutions; he did testify as to what the experience had been as to the length of time required before those solutions became commercial, and he was careful to say that there were so many elements entering into that consideration that it could not be said as applied to any specific case that three or four years would be required to produce a commercial copper solution. Mr. Earl also testified on cross examination that the plaintiff's dump in Markham Gulch had been started in

January or February of 1928, and that in October of that same year the water carried copper, although not commercial, (Tr. 163) and Mr. Earl testified as follows with relation to the dump in Cottonwood Gulch, being the gulch next south from Dixon Gulch:

> The dump in Cottonwood Gulch was begun in July, 1924. Prior to that time there had been potable water flowing in that gulch. It had been used by the town of Bingham for a portion of its water supply. Since that time a flow of copper solution has developed from that dump. It is commercial in form. It became commercial in April, 1927. (Tr. 237) At that date there was about four and a half million tons of material deposited there. That material was of the same general characteristic as that deposited from the plaintiff's mine in these other dumps to which I have testified; it comes from the same section of the mine.

Mr. Goodrich testified with relation to the dump in Cottonwood Gulch that the dump there was begun in 1924, but that on July 7, 1925, the water flowing from it carried 6.45 pounds of copper per thousand gallons of water. (Tr. 652)

One would of course expect some copper in the water below the railroad fill before the making of the dump in Dixon Gulch started in January of 1926. Mr. Goodrich testified that:

> The railroad fill was begun in the summer of 1910. The contractors got through their work

early in 1911 and I think during that spring the fill was completed by hauling mine waste from the Utah Copper mine. . . . There has been a track put through the yard and part of that material was added to the fill, but not very much. I should say about sixty per cent of that fill is overburden from the Utah Copper mine. (Tr. 419)

Mr. Earl testified:

> * * * at right angles to the track the addition in 1914 was about 24 or 25 feet. . .
> * * * from 1910 up to the present time at right angles to the track all additions would amount to probably 30 some feet. (Tr. 2377)

Sixty per cent of that railroad fill is of the same material as is in the Utah Copper dumps from which these copper solutions are derived, and of course would yield some of its copper just as the dumps are doing, the amount depending upon the quantity and grade of the overburden going into the fill. The copper surrendered being trivial in amount, a mere trace, as Mr. Robbe ascertained, i. e., between .0416 and .0832 of a pound per thousand gallons of water. Were there no other evidence it would appear sufficient to prove the source of the copper solutions that the water below the railroad fill so quickly after the making of the dumps above showed an increase in copper content from 6/100th of a pound per thousand gallons to eight or nine pounds. That trace of copper prior to January 1, 1926, came from no other source than the railroad fill, because the waters of the springs at the concrete

dam above the railroad fill were still being devoted to culinary uses. Mr. Marsh testified (Tr. 468):

> From July, 1924, until late in the fall of 1925, I resided in Dixon Gulch at a point, I should judge, about a thousand feet up the gulch from the present Bingham & Garfield yards. We got our water for culinary purposes from a spring nearby the house in Dixon Gulch. The reservoir was possibly one hundred feet down the gulch from the spring.

The situation therefore with which we are here concerned is not that of a spring rising upon Tract D, title to the waters of which is in issue, but that of copper solutions having their origin in plaintiff's dumps of copper ores in Dixon Gulch on plaintiff's property flowing down this precipitous gulch on bedrock and in the railroad fill of the Bingham & Garfield Railway Company, coming practically in their entirety from and out of this railroad fill. From and out of those facts we are called upon to determine plaintiff's right and title in and to those copper solutions and plaintiff's right to condemn, for their conveyance, the channel over which they travel, together with the requisite easements for their collection and diversion. On this basis we will discuss this question.

(B)

Point

The decision in the case of Utah Copper Company vs. Montana-Bingham Consolidated Mining Company, 69 Utah 423, 255 Pac. 672.

Counsel urge upon this court that the above de-

cision is authority for their contention here. That opinion cannot be made to serve defendants' purpose here.

In the year 1907 Utah Copper Company acquired by grant the perpetual and exclusive right to dump its over-burden and low grade copper ores in Tiewaukee Gulch upon the property of the Montana-Bingham Consolidated Mining Company, and the grant provided that Utah Copper Company should have the right at its option "at any time to remove and dispose of any rock, ores, waste or material so dumped upon the surface of said mining property." Utah Copper Company dumped somewhat more than six million tons of material in that gulch pursuant to that and other similar agreements with other owners. It will be noted nothing was said in the contract concerning copper solutions making in the dump and seeping through it to the soil beneath and thence to bedrock and thence down Tiewaukee Gulch over and across the property of the Montana-Bingham Consolidated Mining Company. The suit was one to condemn an easement for the construction of a tunnel to and beneath this dump, there to collect the copper solutions that had made in the dump and flowed down the gulch from above, seeping through the surface soil to bedrock and thence along bedrock and through the surface soil to the face of this tunnel and into the intake Utah Copper Company proposed to construct for that purpose. The tunnel so sought to be

condemned was not within the area under the easement, but the copper solutions were to be intercepted, collected and diverted within that area, being beneath the dumps. Those solutions were to be conveyed thence through the tunnel to be condemned and into a pipe line across and away from the defendants' property to plaintiff's precipitating plant.

The purpose in that suit and that in the case at bar were the same, namely, the acquisition by the defendants in each instance of plaintiff's valuable copper solutions. Of course in each instance the effort was clothed with an affected righteousness, the defendants in each case contending that by operation of law title to those copper solutions had vested in them. In neither case did the defendants want the water, it being the copper only that interested them. In each case the copper solution involved was an artificial product composed of ingredients all of which were the property of the plaintiff, a copper solution that was a definite, definable and identified substance from a known source, the property of the plaintiff, a known owner, wholly the product of plaintiff's industry and investment, mined by plaintiff, transported and deposited in that dump by plaintiff.

In the Tiewaukee case the two estates were one imposed upon the other; in the case at bar the two estates were laterally contiguous. In the Tiewaukee

case the defendant owner of the fee contended that it was a right reserved to the owner of the fee to have the meteoric waters fall upon his land and that the plaintiff did not have the right to prevent those waters from falling upon and saturating its dump, leaching out its copper content, and that those copper solutions belonged to the owners of the fee even while in the dump, but especially after they had reached the natural surface beneath. So in the Tiewaukee case the defendant contested the plaintiff's right to condemn an easement for a tunnel and pipe line on the alleged ground that plaintiff was seeking to collect and divert copper solutions title to which had passed to defendant, and that inasmuch as defendant was itself collecting those solutions and precipitating therefrom their copper content, they were being already devoted to a public use and could not be condemned for the same public use. In this a similarity will be noted to the issue in the case at bar. The defendant appealed from the judgment for plaintiff in that case and the judgment was affirmed by this court. The defendant was not satisfied and petitioned for a rehearing and its petition was denied. Still not satisfied, the defendant instituted a suit in the Federal Court to enjoin the plaintiff's collection and diversion of the copper solutions on bedrock and in the surface soil beneath the dump on the theory that this court had held in the Tiewaukee case that plaintiff was the owner of and entitled to the copper solutions

only while in its dump, and that when those solutions had reached the natural surface of the ground below, title thereto passed to the defendant. But the Federal Court dismissed that complaint and entered its judgment on Utah Copper Company's counterclaim in part as follows:

> First: Defendant Utah Copper Company is the owner of the dump or deposit here involved and all the earth, rock, ores, minerals, waste, water and all other substances therein contained, including copper and other minerals in solution, also the water and copper or other minerals in solution flowing, seeping or percolating therefrom, not only from and out of said dump but from on top of the surface soil or material beneath said dump and on bedrock beneath said surface soil or material beneath said dump and from within the surface soil and material between bedrock and the bottom of said dump, and that the fact that said copper solutions touch, wet or saturate the top of said surface soil beneath said dump, or seep into or percolate through said surface soil beneath said dump, or touch, wet or flow along, over or upon bedrock beneath said dump, neither has resulted nor will result in the passing from the defendant Utah Copper Company to the plaintiff Montana-Bingham Consolidated Mining Company of title to said waters and solutions, but on the contrary the defendant Utah Copper Company was and has continued, is now and will continue, the owner of said copper solutions while in the dump, while on the surface of the soil beneath the dump, while on bedrock beneath the dump, and while in the soil and material between bedrock

and the bottom of the dump or the top of the surface soil and material beneath said dump; and said copper solutions have been heretofore at all times, are now and will continue to be the property of the defendant Utah Copper Company while on and above bedrock, until the same shall have flowed out and seeped and percolated in and through the soil of the plaintiff's mining claims, laterally beyond the periphery of said dump or deposit and off of and from the surface right, interest and estate heretofore conveyed to defendant * * * .

* * * *

Third: That the plaintiff be, and it is hereby, perpetually enjoined from molesting, interfering with, collecting, impounding or diverting, or exercising, asserting or claiming any right, title or interest in, to or with relation to any copper or other waters or solutions in or beneath said dump or deposit, or seeping, percolating or flowing from said dump or deposit, at bedrock in the bottom of said gulch beneath said dump, on the top of said surface soil or material beneath said dump, on bedrock beneath said surface soil and material beneath said dump, or while in the surface soil and material between bedrock and the bottom of said dump or the top of said surface soil and material beneath said dump, until the same shall have flowed out and seeped and percolated in and through the soil of the plaintiff's mining claims, laterally beyond the periphery of said dump or deposit and off of and from said surface right, interest and estate of defendant.

The United States District Court so interpreted the decision of this court in the case of Utah Copper Com-

pany vs. Montana-Bingham Consolidated Mining Company.

Counsel appear to attach great importance to the following from the decision of this court:

> "* * * Were the plaintiff attempting to follow, collect and divert waters, though they carry copper in solution, after they have left the dump and percolating in and through the soil and ground of the defendant not conveyed to the plaintiff, the cited cases would be applicable, but that is not what the plaintiff seeks to do. It may readily be conceded that waters, though they carry copper or other minerals in solution, which are suffered and permitted to flow and escape from the dump and seep and percolate through the soil and earth of the defendant's claims not conveyed to the plaintiff and on or in which it has no surface or other rights, are lost to the plaintiff and become the property of the defendant and may not be pursued or reclaimed or taken by the plaintiff." (255 Pac 675).

Had the plaintiff in the Tiewaukee case not acquired the right to occupy the surface beneath its dump for the purpose for which it was in possession, in other words, had been a trespasser upon that surface, this court would apparently have held, in accord with that part of its opinion above quoted, that the copper solutions would have been lost to the plaintiff after they had seeped or percolated into or upon the surface beneath the dump. But the reason those solutions were

not lost to the plaintiff in that case was that plaintiff was not a trespasser there, but instead had been granted the right to use the surface for the purpose to which plaintiff was then devoting it. Is not the situation the same whether that right be acquired by contract or condemnation?

In the case at bar the two estates are laterally contiguous, but the copper solutions nevertheless flow from one to the other, from the plaintiff's estate to the premises of the defendant, as in the Tiewaukee case. Were these solutions "suffered and permitted (by plaintiff) to flow and escape from the dump and seep and percolate through the soil and earth of the defendants' claim * * * in which it has no surface or other rights," then under the decision of this court it might be reasonably argued that those solutions had been "lost to the plaintiff and become the property of the defendants and may not be pursued or reclaimed or taken by the plaintiff." But what do these defendants think this suit is for? Not being able to acquire by contract the right to convey these solutions over and upon the premises of the defendants, plaintiff found it necessary to institute this suit by which to condemn that right, and, pursuant to the order of court entered into possession of that part of the defendants' premises required for that purpose, and exercising the right so conferred upon plaintiff in and upon those premises, plaintiff proceed-

ed to and has at all times since under that right, conveyed its copper solutions from its dumps down to its intake. Plaintiff has not "suffered and permitted" its copper solutions to "escape" and "seep and percolate through the soil and earth of the defendants' claims * * * on or in which it has no surface or other rights," but instead plaintiff has done and is now doing the only reasonable and practical thing plaintiff could or can do whereby to prevent the "escape" of its copper solutions and prevent their seizure by others who have no right, title or interest in them. In the Tiewaukee case and in that at bar the plaintiff's estate was the upper estate, that of the defendants the lower. In the Tiewaukee case the plaintiff's right to collect and convey the waters upon and through the surface was by contract,—in the case at bar by condemnation. As this court permitted that collection, conveyance and diversion upon the lower estate where the right had its origin in contract, so will this court protect this plaintiff in the conveyance, collection and diversion of its property where plaintiff is in possession by order of court made within its jurisdiction in the exercise of rights conferred by the statutes and laws of this state in aid of mining, in its each and every phase and aspect. Plaintiff conclusively proved that all the copper solutions appearing at the so-called Hays Spring flow directly down the gulch from plaintiff's dumps above, through the railroad fill, and plaintiff has accordingly

conducted over and across Tract D not a drop of copper solution or water that does not originate in plaintiff's dumps or flow therefrom, and that every ounce of copper contained in those solutions has been derived from plaintiff's ores contained in plaintiff's dumps. If we are correct in that such has been the proof in this case, then the conclusion is irresistible that every drop of those copper solutions that have appeared at the so-called Hays Spring has been conducted by plaintiff across Tract D, either through the railroad fill or along and upon bedrock, pursuant to the order of the court below and plaintiff's right thereby. By the court's order, plaintiff acquired the right to convey plaintiff's copper solutions across Tract D and plaintiff has been engaged in the conveyance of its copper solutions across that tract at all times since, pursuant to that right acquired by that order. Moreover, that order and the right of plaintiff thereunder was confirmed by the judgment in this case and there was included in the judgment herein interest on the stipulated amount from the date of the order putting plaintiff in possession, the judgment by relation becoming effective for that purpose as of the date of the order for immediate occupation. Plaintiff's title to these waters under defendants' interpretation of the decision of this court in Utah Copper Company vs. Montana-Bingham Consolidated Mining Company, supra, would depend upon plaintiff's acquisition of the right to convey those

waters across Tract D. Having acquired that right in this suit by court order granting immediate occupation for that purpose, confirmed by the judgment herein, it cannot be said that plaintiff has "suffered or permitted" those waters to "seep and percolate through the soil and earth of the defendants' claims * * * on or in which it has no surface or other rights." Therefore those solutions continued the property of the plaintiff, did not leave plaintiff's estate and did not become the property of the defendants, and those solutions have accordingly been kept constantly in the possession of the plaintiff and constantly upon and within plaintiff's property pursuant to the easements hereby acquired.

(C)

Point

Defendants' law point number 3 relating to the stipulation for the order for immediate occupation—Appellants' Brief, pages 67 to 103.

The above occupies a substantial part of appellants' brief and is a remarkable discussion. Counsel assigned error upon the findings and conclusions, but direct the greater part of their argument against the memorandum of the court. We are not here concerned with what might have been the plaintiff's liability had plaintiff been denied the right to condemn the easements sought. We have no intention of debating that question with counsel, for neither finding nor conclusion can be found

upon what might have been the liability of the parties had the judgment been for the defendants instead of the plaintiff. In our opinion such is not within the scope of this court's present inquiry. When a court of competent jurisdiction shall have adjudged that the copper solutions plaintiff has received in its intake in Dixon Gulch were the property of the defendants, then will be time enough to discuss an accounting—we are not now interested in matters of accounting. The other phase of that discussion, namely, counsel's defense that the stipulation "without prejudice" and the court's order for immediate occupation thereupon are as though neither stipulation nor order had been made at all, is within the scope of this court's inquiry and we will direct and limit our discussion accordingly.

We confess to considerable difficulty in comprehending counsel's conception of their stipulation and its effect. It must always have been apparent to counsel that our only purpose in entering into that stipulation was for the court order for immediate occupation, and that the only purpose for which that order could have been made was to vest in plaintiff the right pending the action to enter into possession of the premises sought to be condemned, and devote them to the uses for which they were sought. The defendants protected themselves against loss in the event plaintiff were not permitted to condemn by exacting from plaintiff a bond in the amount of $10,000.00, and plaintiff complied with

that condition, furnished the bond accordingly, the order then being made as contemplated by the stipulation. The result for which counsel now contend would be so incongruous as to be ridiculous. It had not occurred to either the court or ourselves that we were being imposed upon. Counsel should have had more regard for our credulity. Counsel should not have permitted us to collect and divert those copper solutions ever since June 13, 1928, and in our facilities to have precipitated the copper from them and marketed it in the belief that the court order gave us possession for that purpose pending the action, only to inform us that all we had done was for defendants' sole account, that the stipulation and order were always void because in our credulity and ignorance we had so stipulated. Counsel argue that they had known it all the time, because they had expressly so stipulated, and that because we contended and the court below held, that by the order resulting from the stipulation, the plaintiff had been put into possession for all the purposes within the contemplation of the suit and had continued therein pursuant to that right to and including judgment, that we were "cute" and "tricky," and guilty of "legal legerdemain,"—"as cute, as tricky, a piece of legal legerdemain, as the annals of the law disclose"! (Appellants' Brief, page 97.) In common with many members of the bench and bar, we have received upon various occasions from one of defendants' counsel bits of humor for which he has

acquired a reputation, and it had occurred to us that possibly in the writing of pages 67 to 103 of their brief counsel had made a supreme effort of that character. But the result does not do him justice.

Neither stipulation nor order has been prejudicial to defendants on the trial—no more than are such orders under the statutes and the decisions of this court. The stipulation, however, was a consent to the making of the order and the order gave to plaintiff the right pending the action to occupy the premises and put them to the uses for which plaintiff sought to condemn them. By the judgment, that permission was confirmed, the judgment included interest upon the amount from the date of occupation under that order and plaintiff continues in possession of the premises accordingly. We do not now and never have claimed more for either stipulation or order. There was only one purpose for which that order was or could have been made and that was to vest in the plaintiff the right pending the action to enter into the possession of the premises sought to be condemned and devote them to the uses for which they were sought. Counsel would have this court conclude that the parties made this stipulation, that plaintiff in compliance with its requirements had purchased a bond with corporate surety in the amount of $10,000.00, paid the annual premium of $100.00 thereupon year after year, and the court below had made its order putting plaintiff into possession accordingly,

all to no accomplishment whatever, that although both stipulation and order expressly provided for the right to enter into possession and use of the premises, and the order in addition granted express injunctive relief against hindrance or interference with that right, still that all of that was meaningless and futile, that plaintiff was nevertheless a trespasser, because it provided in the stipulation that it should be "otherwise" without prejudice. Such an argument is worthy of no comment.

(D)

Point

The copper solutions flowing at the so-called Hays Spring flow from plaintiff's dumps down Dixon Gulch in a channel or course definitely known and positively defined, and those copper solutions are not now and never were percolating waters within the legal definition of such.

These copper solutions while in plaintiff's dumps are the personal property of plaintiff, the very corpus of which plaintiff owns, just as plaintiff owns the ores and other material in its dump, Utah Copper Company v. Montana-Bingham Consolidated Mining Company, 69 Utah at pages 430 and 431, where the court held:

> * * * we are of the opinion that the waters carrying copper or other minerals in solution, so long as they are in the dump and thus a part of it, * * * are, like the dump itself, the property of the plaintiff; that it is as lawful for the plaintiff, so long as the waters are

> in the dump, to collect and remove them as it is to remove the dump itself; * * *

and such they continue to be as they percolate through the natural soil upon the surface beneath the dump and thence along bedrock over a channel plaintiff occupies by court order for that purpose to plaintiff's intake. Their character is unchanged, the personal property of plaintiff always identified, never abandoned and never have they become true percolating waters.

Title to such water while in plaintiff's dump before processes of nature have converted it into the valuable copper solution that defendants so much desire, is in plaintiff, and after these natural processes have converted the water, the property of plaintiff, into a thing of value in the form of a copper solution, by leaching out and carrying in such solution the valuable copper in plaintiff's dump, also the property of plaintiff, the solution continues to be and is plaintiff's property. This copper solution is an artificial product composed of ingredients all of which are the property of plaintiff. That solution is a definite, definable and identified substance from a known source, the property of plaintiff, and as it falls upon the the surface beneath the dump, trickles, seeps and flows on and above bedrock in the bottom of the gulch over the channel plaintiff has condemned across defendants' property, it is still such definable, identified substance, traceable and traced

from such known source wherein it was the property of plaintiff, wherein the copper was the property of plaintiff, admitted to be such by defendants, the product of plaintiff's industry, mined by plaintiff, transported and deposited upon that dump by plaintiff and now as plaintiff's property collected by plaintiff in its intake and conveyed away to plaintiff's precipitating plant, where the copper therein contained, plaintiff's property, derived from plaintiff's dumps, is being preserved for plaintiff, its owner.

Particularly is title to these copper soultions in the plaintiff, because plaintiff, pursuant to the order of the court below is now and has been at all times with which we are concerned conveying them from the boundary line of plaintiff's premises over and across the premises of defendants in a channel that is known and defined, possession of which for that purpose has been given plaintiff by the order for immediate occupation made by the court below, followed by the judgment and final order of condemnation herein.

We find an interesting case in that of Los Angeles v. Pomeroy 124 Cal. 597, 57 Pac. 585 (error dismissed without passing upon merits in 188 U. S. 314, 47 L. Ed. 487, 63 L. R. A. 471, 23 Sup. Ct. Rep. 395). In that case the City of Los Angeles sought to condemn 315 acres of land that was saturated with water, at the lower end of which it was proposed to construct a sub-

surface dam, thereby raising the plane of saturation, whereupon it was proposed to tap this heavily saturated bed of sand and gravel by means of a tunnel constructed with lateral galleries, through which the water could be drained off and conducted to the municipal supply pipes. It was contended there was no authority in law for the condemnation of that land for that purpose. The court held, however, that the land was

> * * * to be used as a reservoir, such as essentially it is, and none the less so because the water does not rise and stand above the surface. The evidence in the case shows that from one-fifth to one-third of the entire bulk of the material filling the valley below the plane of saturation is water. The land in its natural state, therefore, is a reservoir, and a subsurface dam is to be constructed in order to make it better serve the purposes of a reservoir. Such being the use to which it is to be devoted, the fee simple may be taken. Code Civ. Proc. § 1239; St. 1891, p. 102.

That part of § 1239, Code of Civil Procedure, in which we are interested is as follows:

> The following is a classification of the estates and rights in lands subject to be taken for public use:
>
> 1. A FEE SIMPLE, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

That section was early enacted into the statutes of Utah. § 7331, Compiled Laws of Utah, 1917, is identical with the above except that in the Utah statute there were added the following words—

> mill, smelter or other place for the reduction of ores.

The Utah section was amended in 1919 (Chapter 126 Laws of Utah 1919, page 346) when the following proviso was added:

> * * * provided, that where surface ground is underlaid with minerals, coal or other deposits sufficiently valuable to justify extraction, a perpetual easement may be taken for the surface ground over such deposits.

By the decision in Los Angeles v. Pomeroy, supra, "the land in its natural state therefore is a reservoir" and is "none the less so because the water does not rise and stand above the surface."

The court in Los Angeles v. Pomeroy also defined a "subterranean stream" as follows:

> * * * it will be convenient to first dispose of the main question in the case, viz., the proper definition of a subterranean stream. There is no dispute between the parties, and no conflict in the authorities, as to the proposition that subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams. * * * the law, as applicable to the present case, is

well eptiomized in section 48 of Kinney on Irrigation, as follows:

'Subterranean or underground water courses are, as their names indicate, those water currents that flow under the surface of the earth. * * * In and near the mountains many streams have a bed which was originally a rocky canon, but has been filled up with boulders and coarse gravel. In this debris a large portion or all of the water sinks from sight, to reappear only when some rocky reef crosses the channel and forces the water to the surface. The movement of this water through the porous gravel, owing to the declivity of the stream, is often quite rapid, and a considerable volume may thus pass down the channel hidden from sight. These water courses are divided into two distinct classes,—those whose channels are known or defined, and those unknown and undefined. * * * the word 'defined' means a contracted and bounded channel, * * * and the word 'known' refers to knowledge of the course of the stream by reasonable inference. * * *' In this case the boundaries of the channel and the existence and course of the underground stream were unknown and undefined, except so far as they could be inferred; but there was a great amount of evidence from which a reasonable inference could be drawn that the channel was bounded and defined by the sloping sides of the Cahuenga and Verdugo hills meeting underground, * * *

The trial court had given the following instruction, which was approved by the supreme court of California:

(20) If you find from the evidence that

the lands sought to be condemned are situated at the lower portion of, and form a part of, the San Fernando basin or watershed, near or at its outlet, and that said basin is about twenty-four miles long and about twelve miles wide at the widest point, and that said outlet is from two thousand feet to three miles wide, and bounded and defined on the southern side by the rock of the Cahuenga range, and on its northern side by a similar rock of the Verdugo hills, and that the earth of which the basin is generally composed, including said outlet and the land sought to be condemned, is an alluvial or other deposit made up of loam, sand, gravel, and boulders, mixed together and interspersed with broken or irregular strata or masses of clay or cemented sand and gravel, and lying in place as originally deposited by the forces of nature, and that as the same lies in place the natural voids or interstices of such earth generally throughout the basin, including the defendants' lands and said outlet, are equal to from one-fifth to one-third of the bulk of the entire mass, and that such entire deposit lies upon a grade or slope towards and through the outlet of such basin, and that all the water falling in the watershed of such basin, which is not lost in storm, run off, or by evaporation, or in supporting plant life, or held immovable in the ground, sinks into the earth composing such basin, and thence by force of gravity moves down through such voids or natural interstices of the earth throughout the greater portion of the entire mass to the outlet of the basin, through which it passes, * * * if such water does collect underground and flow in certain courses or channels through coarse, permeable material therein, where the existence and general course of the flowing or moving

> body of water can be easily determined, then the water so moving in such channels would constitute a water course, although not visible on the surface, and although the space through which the channel extends may be largely filled with the material through which the water flows. * * *

Counsel apparently are of the opinion that all waters that percolate are percolating waters within the legal definition, and that percolating waters do not "flow" in defined and known channels, but there is nothing in the cases counsel cites or in any others of which we are aware that justifies such a conclusion. In the case annotated it is said at page 1381 of 55 A. L. R. that percolating waters

> * * * may flow in a well-defined channel and be such as, if on the surface, would answer the description of a watercourse, but, in order to be subject to the law of surface water, the existence, location, and flow of the water must be known to the owner of the land through which it flows, or it must be discoverable from the surface of the earth. * * * Furthermore, 'the knowledge required * * * must be knowledge by reasonable inference, from existing and observed facts in the natural or rather preexisting condition of the surface of the ground.' * * *

Upon the same page appears the following quotation from 27 R. C. L. at page 1170, § 90:

> The distinction between rights in surface and in subterranean streams is not founded on

> the fact of their location above or below ground, but on the fact of knowledge, actual or acquirable, of their existence, location and course, and the court's endeavor, so far as practicable, to apply the rules of law applicable to surface streams or bodies of water existing in well-defined channels to the like streams or bodies existing underground.

See also Kinney on Irrigation and Water Rights (2d ed.) Vol. 2 §§ 1155, 1156, at pages 2098 to 2101, and Los Angeles v. Hunter, 105 Pac. 755, 156 Cal. 603.

These copper solutions flow down Dixon Gulch through the railroad fill and come to the surface of, from and out of the railroad fill, along a course and in a channel thoroughly well-known and perfectly defined. No one is interested whether or not in their flow within this channel and along this well-known and defined course they seep and percolate. Mr. Goodrich was quite accurate when he testified as follows:

> I would say that Dixon Gulch is a well defined channel. * * * The entire gulch is a well defined channel. I would say the waters that come through the fill and find their way into tract D come through in a well defined channel. The channel is all of tract D; they come through everywhere in all of that area. During the low season of the year I believe the particular part of tract D where they came through is the bottom of gulch, * * * they would also flow through the drain tunnel. Except in the drain tunnel and the bottom of the gulch they would

> not come through any other place at low water season in commercial quantities. (Tr. 329) * * * I say that in low water a flow like it is now that substantially all of the water will come through the drain tunnel or come down underneath and flow into the old channel of Dixon Gulch; it will come down the bottom of the gulch. (Tr. 330) * * *

At the outset in the trial of this case, in the course of counsel's argument upon defendants' motion for a non-suit, it was the defendants' theory that plaintiff could "condemn a right through our land so that they may go up into their lands and collect their water. That is all right; they can do that;" (Tr. 700) But the only difference between that and what the plaintiff is doing in this case is that by the course counsel suggest, plaintiff would have conveyed a part at least of its copper solutions over and across the defendants' lands along on top of bedrock in an artificial channel the plaintiff at great risk and expense would have cleared beneath the railway fill, just as plaintiff proposed to do with relation to its Tiewaukee dump. The solutions would then have flowed in the same channel as those on bedrock in the bottom of Dixon Gulch, if any, now occupy. We do not understand that the fact that plaintiff had driven a tunnel on bedrock up beneath the fill for these waters would bring the plaintiff's effort within the statute, but that otherwise, regardless of the public use to which the tract were devoted, title

to those waters would nevertheless vest in the defendants under the law applicable to surface waters. The statute does not require the condemner as a condition precedent to condemnation to clear the channel and then by a condition subsequent forfeit the right acquired when the channel shall contain large boulders. What the cleaning of the channel has to do with plaintiff's right to condemn, so long as the channel shall be put to the uses within the contemplation of the statute, is quite beyond our comprehension. It can be of no importance whether the channel were artificial or as nature made it, under the authorities it makes not the slightest difference that this ditch shall have been filled up to the top of the mountains by the railroad fill, if, notwithstanding, it shall still serve the purpose of a ditch, shall still be devoted to the uses for which the statute authorizes the exercise of the right of eminent domain. In Los Angeles v. Pomeroy, supra, the pass between the Cahuenga range and the Verdugo hills was on the surface from one and one-half to two and one-half miles in width, "and that in its borings have been made over 100 feet in depth before encountering bedrock." But the court held:

> but here is not only water moving in a definite direction, but also sides and bed to the channel in which it is moving, and these, also, are comprehended in the court's definition of a subterranean stream.

Is this narrow channel in the bottom of Dixon

Gulch, occupying as it does the whole of Tract D, any less known and defined?

The copper solutions that pass from plaintiff's dumps to its intake through the railroad fill never become the property of the defendants because never upon, within or a part of defendants' estate. Copper solutions that at some time in their course to plaintiff's intake flow upon bedrock or upon the natural surface soil of the defendants' premises beneath the fill, or through the railroad fill, flow in a known and defined channel identified by the precipitous walls of the gulch and its bedrock bottom, and well known, a channel not only so definitely known and positively defined, but one that is in the possession of plaintiff pursuant to court order for immediate occupation and the succeeding judgment, and is being devoted by plaintiff to plaintiff's use for the purposes for which plaintiff seeks to condemn it, purposes within the express provisions of the statutes authorizing the exercise of the power of eminent domain.

(E)

Point

Plaintiff possesses the power to condemn Tract D for the purposes alleged.

Tract D is sought in its natural state for a natural outlet for the copper waters flowing from plaintiff's dumps in Dixon Gulch, out of which mineral deposit there is constantly being leached plaintiff's copper con-

tained in plaintiff's ores that compose those dumps, which copper is carried in solution down Dixon Gulch to the intake for which plaintiff seeks to condemn Tract C. Tract D is sought in its natural state for a ditch, flume, aqueduct or conduit to facilitate the reduction of ores and the working of this mineral deposit consisting of plaintiff's dumps in Dixon Gulch. It is of course conceded that plaintiff is the owner of these dumps and of all copper solutions while in the dumps and while in or on plaintiff's land upon which the dumps have been deposited. Plaintiff is the owner of the whole drainage area of Dixon Gulch down to the boundary line of the Valentine Scrip. Tract D lies in the bottom of the gulch at its narrowest point, which is upon the Valentine Scrip. The right plaintiff seeks to condemn therefore is merely that to convey copper solutions, conceded to be plaintiff's property at the Valentine Scrip boundary, across a part of the Valentine Scrip to plaintiff's intake, where they are being and will be collected and conveyed thence to plaintiff's precipitating plant, where plaintiff's copper is recovered from plaintiff's copper waters and disposed of by plaintiff.

Plaintiff's right to take Tracts A, B, C and G for the respective purposes pleaded not being resisted, this appeal is concerned with Tract D only, i. e., with plaintiff's effort to condemn Tract D in its natural state for a natural outlet for the copper waters flowing from the

plaintiff's dumps in Dixon Gulch and for a ditch, flume, aqueduct or conduit to facilitate the reduction of ores in, and the working of plaintiff's mineral deposit consisting of, plaintiff's dumps in Dixon Gulch. There are constantly in operation in those dumps forces accomplishing the gradual leaching of plaintiff's copper from plaintiff's ores there deposited and the carrying away in solution of plaintiff's copper so leached from plaintiff's ores, the dumps yielding a steady stream of copper waters that flow down the gulch and through the railroad fill of the Bingham & Garfield Railroad. Unless plaintiff be permitted to recover its property as plaintiff proposes, plaintiff's copper solutions will flow thence on down into Bingham Creek and to waste, or into the possession of others who, like the defendants in this case, neither own them nor have any right, title or interest in them.

By order of the court below on June 13, 1928, made upon the stipulation of the parties hereinbefore discussed, plaintiff entered into possession of Tract D and the remainder of the premises sought to be condemned, constructed plaintiff's diversion facilities and thereafter diverted those waters to plaintiff's precipitating plant, where their copper content has since been and is being precipitated. The defendants are not in possession of the surface area within Tract D, nor have they been since 1910 when by the conveyances and condemnation decree hereinbefore mentioned the railway

company acquired its railroad easements. The occupation of the Bingham & Garfield Railway Company is from the nature of its use exclusive, and has continued so since these conveyances and the condemnation decree.

Has the plaintiff in this action the right to condemn Tract D for the purposes stated? That is the only question this court is called upon to determined.

Plaintiff derives its right to exercise the power of eminent domain by virtue of Chapter 65, Compiled Laws of Utah 1917, and by that act and its predecessor acts from which it was evolved, mining generally in the State of Utah was declared to be a public use in aid of which private individuals and private corporations may exercise the power of eminent domain. That it was the intention of the legislature by these statutes to declare mining generally a public use in the State of Utah is apparent from a reading of § 7330. The enumeration contained in that section with relation to mining includes every mining activity of which the most fertile imagination could conceive. While the purpose for which plaintiff here seeks to condemn Tract D is expressly within that enumeration, still, were that not the fact, the purpose for which plaintiff now seeks to condemn Tract D being in furtherance of plaintiff's mining operations, plaintiff would under this statute possess the power to condemn as herein prayed, because mining generally in this state is the public use in aid of which that power has been granted by the statute.

It may happen some day that a situation will arise in the conduct of mining operations in this state in one of their many aspects that a mining company may find it necessary to exercise the power of eminent domain for a use not precisely designated by the statute, but necessary to the recovery or preservation of its property, hence in furtherance of its mining operations. A mining company may, for instance, find a neighbor bent upon seizing its property, the latter occupying a position from which the mining company if denied the right of eminent domain must suffer the neighbor's continued appropriation of the mining company's property, this for no other reason than that the then state of the law afforded the owner of the property no relief, but when that time shall come, mining generally in the state of Utah will of course be again declared to be the public use in aid of which the power of eminent domain may be exercised, and that although the precise purpose for which it shall then have become necessary to exercise the power be not expressly enumerated in the statute, the courts will hold that mining being the use for the furtherance of which the power was granted, mining will be the justification for its exercise, whether or not the precise purpose then served be included in the statutory enumeration.

It is because the mining industry in the State of Utah is of such vital concern to its people, so essential to the public welfare, that those engaged in that in-

dustry have been endowed by the statute with the power of eminent domain when exercised in furtherance of the mining industry. Highland Boy Gold M. Co. v. Strickley, 28 Utah 215, 78 Pac. 296. Affirmed 200 U. S. 525. Should it become necessary to the efficient conduct of any phase of one's mining operations to acquire an easement over a tract of land for use in its natural state as a canal whereby water might be conveyed for that use, are the courts to microscopically scrutinize the enumeration contained in § 7330 and deny the right merely because by definition a canal is a thing artificial, not as nature made it, that the power might be exercised for the construction of a canal but not to condemn the land in its natural state to serve as such, this for no better reason than that the enumeration did not include the appropriation of land in its natural state for that purpose? Are considerations of public welfare served if the channel be an artificial one, but not served if the channel be as nature made it? Such reasoning is nonsense.

It is said in Highland Boy Gold M. Co. v. Strickley, supra:

> * * * The mining industry in this state, and in others similarly situated, not only produces a home market for products of the farm, and furnishes thousands of men with steady employment at liberal and remunerative wages, but also produces wealth which has enabled other industries to be created and to flourish, which,

without the stimulus thus furnished, would languish. * * * We have in this state in addition to the extensive deposits of gold, silver, lead, and copper ores, large areas of lands containing coal in almost limitless quantities, and we depend almost exclusively upon the coal mines for the fuel used in our manufacturing establishments and for domestic purposes. Now, it is of vital importance to the people that the coal, as well as the other hidden resources of the state, be opened up and developed, and that the mining industry in general, which has been the source of so much wealth to the people of this and other Western states, be conducted on the same extensive scale in the future that has characterized its operations in the past. Therefore the public policy of the state, as exemplified by the act of the Legislature under consideration, is to encourage the people to open up and exploit the mines with which the state abounds, and thereby not only give to the state the wealth which will enable other industries to be created, but furnish thousands of laborers with remunerative employment.

In a later decision, this time in Monetaire M. Co. v. Columbus Rexall Consol. M. Co., 53 Utah 413, 174 Pac. 172, the supreme court of this state again similarly declared itself, that time as follows:

> Mr. Lindley, in discussing the right of eminent domain as applied to mining, in his excellent work on Mines, in volume 1 (3d ed.) p. 612 says:
>
> 'It is manifest, however, that there is a marked tendency, evolutionary in its nature, to break away from the old rigid rules on the subject of 'public use,' and to enlarge the definition of the

> term, so as to make it synonymous with 'public welfare.' This tendency is no doubt influenced to some extent by the growth and spread of sociological ideas which seek to influence the construction of constitutions and statutes in the interest of the group instead of the individual, and to authorize the condemnation of private property for any use which stimulates or encourages the development of the natural resources of the country. * * * But the test of 'public welfare' instead of the old doctrine of 'public use' is being gradually extended, with the promise of its becoming the prevailing doctrine in most jurisdictions.'

And then the court concluded:

> It is too late now to insist that the people of both the state and nation are not interested in and benefited by the development of the mineral resources and wealth of both the state and the nation. The people are likewise interested in having the mineral resources developed at as little cost and expense as possible, since in no other way can the ores of the lower grades be developed and mined.

We do not serve public welfare, considerations of which gave birth to the eminent domain statute, by quibbling over the definition of words employed in the enumeration in § 7330, by shutting our eyes to the purpose served and deciding that land may be condemned for a canal artificially to be constructed, but that land in its natural state might not be condemned, although for precisely the same use. That would be absurd.

In the case at bar the precise situation suggested in Highland Boy Gold M. Co. v. Strickley, supra, does not arise. We do not have a neighbor who seeks an exorbitant payment for a right of way over his property. We go one step further in this case; here the plaintiff has a neighbor who has concluded that if he can block plaintiff's attempt to divert and preserve plaintiff's copper solutions from plaintiff's dumps, those solutions will become his property; he argues that after the solutions have passed from plaintiff's land over the boundary line and upon defendant's property, title has passed to defendant, this although by court order plaintiff has been given permission to carry its copper solutions from its property so over and across the property of defendants. Therefore the defendants insist that, the solutions being theirs, defendants are entitled to a judgment of some hundreds of thousands of dollars if plaintiff be permitted to condemn and so appropriate these copper waters, but that plaintiff should not be permitted to condemn because the solutions belong to defendants, and defendants can precipitate from them their copper content as well as can plaintiff, thus putting them to the same public use. In all this the defendants admit title to these copper solutions in plaintiff while upon plaintiff's land, and defendants further concede that had plaintiff sought to condemn an easement for a tunnel or other *artificial* canal through defendants' property, through which to divert the cop-

per solutions, the solutions although running along this *artificial* canal across defendants' property would continue plaintiff's property, would not become the property of defendants—in other words, if the canal be *artificial,* title to the copper solutions will not pass to the defendants, but if the course be over the ground in its natural state, title will pass to the defendants, notwithstanding the fact that plaintiff is taking its water over the latter course by the order of this court putting plaintiff in possession for that purpose, and even notwithstanding in this proceeding plaintiff permanently acquire the right by the actual condemnation of that natural water course, ditch, outlet or whatever it may be called. That method of reasoning is indeed fantastic; were it to be generally indulged neither property rights nor one's intellectual equilibrium could survive, to say nothing of the public welfare.

Mining *generally* in the State of Utah is the public use in aid of which the exercise by the plaintiff of the right of eminent domain may be justified, mining *generally,* not certain of its incidents, but all of them. That is apparent from the statute and the statute has been so interpreted by this court. In Monetaire M. Co. v. Columbus Rexall Consol. M. Co., supra, the court held:

> * * * In examining all of the subdivisions of section 3588 (§ 7330 Comp. L. 1917) and of section 3590, one becomes convinced that it was

> the intention of the legislative power of this state to declare mining generally and the development of mines and mineral deposits a public use, in furtherance of which the right of the exercise of eminent domain was applied with full force and effect. This is apparent from the first enactment of the law of eminent domain as found in Laws Utah 1884, tit. 7, p. 348. Section 3588 has been amended and extended in some particulars ever since title 7 of 1884 was enacted.

Not only did the court in that case hold that in this state mining *generally* was the public use in aid of which the right of eminent domain could be exercised, but that such use having been by the statute declared a public use, the statute must be given a broad and liberal interpretation in its application to that use and the exercise of the power of eminent domain with relation thereto. The court held:

> The intention of the Legislature to extend the right of eminent domain to mines and mining being clear and unequivocal, what is the rule respecting the construction and application that should be given to the acts of the Legislature in granting the right of eminent domain for the uses and purposes contemplated in the Act? * * *
>
> We think it is generally agreed that where the right of eminent domain is granted for a particular purpose, then the statute must be given a liberal construction in furtherance of such purpose. Our statute, in clear and explicit terms, grants the right of eminent domain for the purpose of developing the mining industry

and for the purpose of developing the mineral resources of the state, regardless of ownership. Under those circumstances, therefore, the rule of construction that is applied by Mr. Justice Hawley in the case of Douglas v. Byrnes (C. C.) 59 Fed. 28, should be applied. Mr. Justice Hawley, in passing upon the eminent domain act of the State of Nevada respecting the development of mines (C. C.) 59 Fed. at page 31, says:

> 'The power of the Legislature, having been fully recognized and sanctioned, the purpose of the act should not be hampered by any narrow or technical objections. The importance of encouraging the mining industry of this state must be kept in view. This was the object, intent, and purpose of the Legislature in passing the act, and its wisdom, policy, and expediency was thereby determined. A reasonable, fair, just, broad, and liberal view should be taken by the court in interpreting its provisions.'

The purpose for which plaintiff here seeks to condemn Tract D is expressly within the enumeration in § 7330. Eliminating from this section what obviously does not apply to plaintiff's effort here, carefully preserving each provision without distortion, we will have the followning:

> 7330. (3588). Exercised in behalf of what uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:
>
> 2. * * all public uses authorized by the legislature;
>
> * * *

> 5. * * * canals, ditches, flumes, tunnels, aqueducts, and pipes for the supplying * * mines, mills, smelters, or other works for the reduction of ores with water * * *
>
> 6. * * * tunnels, ditches, flumes, pipes, * * * to facilitate the milling, * * or other reduction of ores, or the working of mines, * * * or mineral deposits; outlets, natural or otherwise, for * * water from mills, * * or other works for the reduction of ores; or from mines, * * or mineral deposits; * * also any occupancy in common by the owners or possessors of different mines, * * * mineral deposits, mills, * * * or other places for the reduction of ores, or any place for the flow, deposit, or conduct of tailings or refuse matter; * * *

We are at once confronted by the express designation in paragraph 6 of § 7330 of "outlets, natural or otherwise, for * * * water from mills * * * or other works for the reduction of ores; or from mines * * * or mineral deposits;" and that is sufficiently precise and explicit to afford plaintiff abundant authority for its condemnation of Tract D for use as herein specified, although an express provision of the statute were required and the statute had not been judicially construed as we have indicated. If there ever were a natural outlet for the waters from a mineral deposit Tract D is such an outlet for the copper waters from plaintiff's copper ore dumps or mineral deposit in Dixon Gulch. It does not require a stretch of the

imagination to construe as "works for the reduction of ores" plaintiff's dumps in Dixon Gulch, where the ores have been deposited and are there being exposed to the oxidixing influences of the air and meteoric waters and thus induced to surrender their copper content in the form of copper solutions that flow over and across Tract D, a natural outlet.

Plaintiff's precipitating plant near the mouth of Bingham Canyon, to which all of these copper waters are conveyed and where their copper content is precipitated, comes within the definition of "works for the reduction of ores." Therein water is necessary, for the copper cannot be leached from the ores in plaintiff's dumps or mineral deposit except through the medium of water, cannot be conveyed from those dumps or that mineral deposit except through the medium of water, which picks up and conveys the copper in solution from the dumps or mineral deposit over and across Tract D, the natural outlet, and thence to plaintiff's precipitating plant, where one phase of the process of reduction is concluded. Therefore the plaintiff is within the express provision of paragraph 5 of the enumeration contained in § 7330, whereby it is enacted that condemnation may be had for

> * * * canals, ditches, flumes, tunnels, aqueducts, and pipes for the supplying * * mines, mills, smelters, or other works for the reduction of ores with water * *

Paragraph 6 of § 7330 includes in its express enumeration—

> tunnels, ditches, flumes, pipes * * * to facilitate the milling * * * or other reduction of ores, or the working of mines * * * or mineral deposits;

The condemnation of Tract D is "to facilitate the reduction of ores" and the "working of a mineral deposit"; it is a necessary link in the process, first, of oxidation and leaching, and secondly, in that of precipitation, all of which are necessary to the recovery from plaintiff's ores or mineral deposit of their copper content.

But counsel argue that the plaintiff does not come within these provisions of the statute because there neither is nor will be a ditch, flume or conduit across Tract D, counsel assuming that the ground in its natural state could not become a ditch, flume or conduit.

In Bouvier's Law Dictionary (Rawle's Revision) Vol. 1, page 591, we find the following definition of the word ditch:

> DITCH. The words 'ditch' and 'drain' have no technical or exact meaning. They both may mean a hollow place in the ground, natural or artificial, where water is collected or passes off. 5 Gray 64.

and in 14 Cyc. 552, the following:

> DITCH. * * * A hollow space in the ground, natural or artificial, where water is collected or passes off.

In Smith v. Hampshire, 4 Cal. App. 8, 87 Pac. 224, which was a case involving an asserted right by prescriptive use to the continued use of an artifically excavated ditch for the conveyance of water for irrigation, the court defined a ditch as "no more than a right of way for the passage of water."

Sherrod v. Battle, 154 N. C. 345, 70 S. E. 834, was a case to define a boundary by the following description contained in a deed:

> Beginning at the head of a ditch on the Enfield and Tarboro Road, about equidistant from the buildings on the land of J. H. Cutchin and (those on) the Nevill place, running with said ditch in an eastern direction to a branch; thence with said branch to the edge of Griffin Swamp; thence due east to the canal; and thence by various calls to the beginning.

There was more than one ditch and the facts called for a definition of the word "ditch." The court defined the term as follows:

> The words 'ditch' or 'drain have no technical or exact meaning. They both may mean a hollow or open space in the ground, natural or artificial, where water is collected or passes off * * *

quoting from Goldthwaite v. East Bridgewater, 71 Mass. (5 Gray) 61.

In Sefton v. Prentice, 103 Cal. 670, 37 Pac. 641, at 642, the court defined the terms with which we are here concerned as follows:

> 'Conduit' is a general word, which applies to any channel or structure by which flowing water can be conducted from one point to another. It includes a ditch, flume, pipe, or any kind of aqueduct.

The case of Ange & Forest v. Atlantic Coast Line R. Co., 159 N. C. 547, 75 S E. 796, was one requiring a definition of the word "canal" as used in the statute, and the court held that as there used "the term 'ditch' and 'canal' is used indiscriminately to designate an artificial drain." The court then continued:

> In the ordinary acceptation of the terms, both indicate a channel constructed for the purpose of conveying water, the only difference being that the word 'canal' suggests a channel of larger dimensions than does the word 'ditch,' but as defined by the authorities a ditch may be natural or artificial * * * while a canal is an artificial trench for confining water to a defined channel * * * or a trench or excavation in the earth for conducting water and confining it to narrow limits * * *.

We find the word "aqueduct" defined in the Century Dictionary as follows:

> 1. A conduit or channel for conducting water from one place to another.

In Webster's New International Dictionary, 1918, the word "conduit" is defined as follows:

> 1. * * * a natural channel or passage for conveying water * * * an aqueduct, canal or channel;

The court below disposed of this question in the following convincing manner:

> The other question is whether, assuming the facts to be as hereinbefore indicated, Tract D is subject, nevertheless, to condemnation. The court concludes that in view of its finding relative to the source and course of the copper waters, it is.
>
> The tract is subject to condemnation under the law, in the opinion of the court, as "A natural outlet for water from works for the reduction of ores," or as "A natural outlet from a mineral deposit." Just as the copper solution is water for the purpose of applying the law of water thereto so it is water in considering whether the statute may be construed as including it in the foregoing quoted phrases, even though plaintiff is seeking an outlet from the dump for the purpose of conveying it and using it elsewhere rather than to get rid of it. The dump is either a mineral deposit or it constitutes an essential part of the works for the reduction of ore. The fact that the water used in one of the steps in its reduction is that which adventitiously falls thereon, rather than water turned on or poured on the dump would make no difference. Water from placer mining operations doubtless would come within such provision of the statute. If it would, then it would seem that water flowing

from the dump in question, if such water were poured from a hose or turned from another source thereon would, and it seems to the court that the artificial application of the water should make no difference. (Abs. 593-4).

(F)

Point

The taking is necessary to the use.

This court very clearly defines "necessity" with relation to this subject in Postal Telegraph Cable Co. v. Oregon Short Line Railway Company, 23 Utah 474, at 484-5, as follows:

> It is also argued that no necessity has been shown to exist for the taking of the right of way. But it is shown that the respondent made a bona fide effort to agree with the appellant upon terms for the taking of the land sought, and that the latter refused to consider respondent's proposition or to negotiate with it at all. The necessity, therefore, exists for the taking. It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work. The necessity is shown to exist when it appears that it is necessary to take the land by condemnation proceedings in order to effectuate the purposes of the corporation. * * * The respondent has the right to determine when and where its telegraph line shall be built. It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the

> selection of land will not be interfered with. * * * With the degree of necessity or the extent which the property will advance the public purpose, the courts have nothing to do. * * * When the use is public, the necessity of expediency of appropriating any particular property is not a subject of judicial cognizance. * * *

The rule is similarly stated in 20 Corpus Juris 632, as follows:

> * * * the grantee of the power, in the absence of legislative restriction, may determine the location of the land required, and such determination will not be interfered with by the courts if it is made in good faith and is not capricious or wantonly injurious * * * The landowner cannot raise the objection that there is no necessity for condemning his property because some other location might be made, or some other property obtained which would be more suitable.

and counsel upon the occasion of their argument of defendant's motion for non-suit (Tr. 747) admitted that the rule as to necessity was correctly stated in Goldfield Consol. M. & T. Co. v. Old Sandstrom A. G. Min. Co., 38 Nev. 426, 150 Pac. 313 and 318, as follows:

> The rule as to what is 'necessary' in condemnation proceedings was clearly stated by this court in the case of Overman S. M. Co. v. Corcoran, 15 Nev. 147, where it is said:
>
> > 'Individuals, by securing a title to the barren lands adjacent to the mines, mills, or works, have it within their power,

> by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities, and confirms the opinion there advanced that 'the mineral wealth of this state ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining.' The law does not contemplate that an 'absolute necessity' should exist for the identical lands sought to be condemned. The selection of any site for the purposes specified must necessarily, to some extent, be arbitrary.'

This rule is sustained by the great weight of authority. * * *

The contention that the land cannot be condemned because there are other lands further away that are available for the purpose sought is of no force. * * *

It is the general rule that, when a corporation seeks to exercise the right of eminent domain, its discretion in the selection of land for its use will not be questioned where it acts in good faith and not capriciously. * * *

If such were not the rule, the same defense could be made with regard to any lands plaintiff might seek to condemn. We are clearly of the opinion that a necessity was shown by respondent for the condemnation of the land.

The defendants are not inconvenienced by the taking (judgment, Abs. 673 to 675, final order, Abs. 682 to 684). The defendants are of course devoting the premises to no use whatever, nor have they any use for them except this, that they would like to collect and appropriate on Tract D plaintiff's copper solutions from plaintiff's dumps in Dixon Gulch if they can succeed in blocking plaintiff's effort to do so. Plaintiff does not seek to disturb the premises in any manner; every right is reserved to defendants except the right in plaintiff to preserve plaintiff's own property for plaintiff's own use, and the Bingham & Garfield Railway Company is in the exclusive possession of the premises anyway. Attention is directed to the following provisions of the final order of condemnation, which are repeated from the judgment:

> It is hereby further Ordered, Adjudged and Decreed:
>
> That plaintiff shall acquire by said taking only the rights and easements herein defined, and shall not acquire thereby either claim, right or interest, ownership or title in or to any ores, minerals, waters or other values that may be beneath the top of bed-rock beneath said tracts, or any right of subjacent or subsurface support.
>
> That defendant Stephen Hays Estate, Inc., shall retain the right in good faith to prospect for, mine and remove such ores, minerals, waters, or other values as said defendant shall encounter beneath the top of bed-rock beneath the tracts

hereby condemned except Tract C, and therein beneath plaintiffs catchment facilities, and in the course of said mining operations to dump upon the surface of all or any of said Tracts A, B, C and D whenever and wherever said mining operations shall reasonably require, provided, however, that, before any material shall be dumped upon said tracts, or any of them, or any other or different use be made thereof, said defendant Stephen Hays Estate, Inc., shall have given plaintiff thirty days' notice in writing of such intention, and of the character of use to which said premises shall be so subjected, and thereupon plaintiff shall have the right and privilege at plaintiff's expense of relocating and reconstructing plaintiff's facilities affected thereby to and upon such other unoccupied tracts of land, if any there may be, owned by defendants, or any of them, from which no interference shall result with the said operations of said defendant Stephen Hays Estate, Inc. If the waters or solutions on or upwards from the top of bedrock, or any part of such waters or solutions, shall be intercepted by reason, or in the course, of mining operations, plaintiff shall have the right to enter such mine workings and therefrom, or by such other method as shall be suitable, repair bed-rock to the end or extent that its condition shall be re-established substantially as that in which it presently exists, or by any other method continue the collection and diversion of the waters and solutions on top of bedrock. Defendant Stephen Hays Estate, Inc., shall retain the further right to make any other use of the tracts of land hereby condemned consistent with the use thereof for which said tracts are hereby acquired.

What plaintiff seeks to acquire is of nominal value only and no damage can result to defendants, so the defendants stipulated that the value of the premises condemned, together with the damage to result to the balance of defendants' property by reason of the taking, was the nominal sum of $500.00, defendants excluding the copper waters, title to which they claimed.

The substituted diversion facilities defendants propose are not only prohibitive in expense, but wholly impractical and generally unsatisfactory. The evidence discloses that always in the collection and diversion of the copper solutions from plaintiff's dumps the intakes are constructed from beneath bedrock, thence by raises through bedrock into or just below the toe of the dump the solution from which is desired. The quantity of water encountered immediately upon bedrock varies according to the character of the soil or material on bedrock at the intake. In Dixon Gulch at plaintiff's intake on Tract C very little of the solutions were obtained immediately on bedrock (Tr. 39, 104) because the material at that point was capable of being so compressed by the weight of the railroad fill above that it became relatively impervious. The testimony contains many examples of like occurrences beneath other dumps. Nevertheless, to be sure that *all* the copper solutions are obtained, the intakes are constructed from beneath bedrock to and through the top of bedrock, intercepting the solutions on the top of bedrock and

upwards. The evidence in this case discloses not a single instance wherein any part of the copper solutions sought were beneath the top of bedrock.

The face of the tunnel or intake proposed by the defendants is on the Gardelli placer gravels up Dixon Gulch from the railroad fill, and those placer gravels were described by Mr. Earl as follows:

> * * * The rocks in those placer gravels would be from, oh, I have seen rocks there from three feet long, a foot and a half in diameter, many of them; there are a lot of rocks that were around six or eight inches in diameter, lots of them; I have seen many rocks there that old man Gardelli couldn't lift, and he was a very strong man. (Tr. 2428) That is not unusual. There are a lot of those down an old stream bed.
>
> I would say 30 or 40 per cent of the placer dump was composed of rocks larger than six inches in diameter, * * *

Mr. Christensen similarly described those gravels. (Tr. 2100-2103)

Defendants' proposal is illustrated by their Exhibit 61. It does not contemplate the collection of waters at plaintiff's property line, but instead placing the portal of a proposed tunnel at plaintiff's property line and collecting the waters four hundred and thirty feet or more up the gulch within plaintiff's property. The defendants' witness Crocker sponsored this proposal. The face of the tunnel as illustrated upon Ex-

hibit 61 is at the bottom of plaintiff's dump but on the placer gravels. Mr. Crocker testified that there was deep wash there, how deep he did not know.

> * * * whether it be twenty or thirty feet or more; I should judge it was quite deep. In places it might be more than thirty feet. (Tr. 1395) * * * The gulch widens a little at that point so I don't know whether the thickness at that point would be thirty or forty feet. I have no judgment about it. As to my assuming in our Exhibit 61 that bedrock lay within ten feet of the natural surface in the bottom of the gulch, I did not definitely assume that bedrock lay anywhere at that point. (Tr. 1396) * * * I intended to show on Exhibit 61 this proposed tunnel of ours in red as being throughout its course in bedrock. I don't know whether bedrock was there or thirty feet below there. * * * Supposing that the present face of our tunnel as I project it lies thirty feet above bedrock, I could not say how far I would expect to continue it in order to intercept these waters on bedrock. (Tr. 1400)

The plaintiff's mine engineer, Mr. Earl, testified as follows with relation to the defendants' proposal:

> Referring to the testimony of defendant's witness Crocker and his exhibit in that relation, exhibit 61, by which he attempted to suggest another method of collecting these waters this time on the property line of the Utah Copper Company rather than down in the bottom of the gulch, as to whether or not that was a reasonable practical method of collecting and diverting these copper waters,—it is not. (Tr. 2272) I might state first my understanding of Mr. Crock-

er's testimony did not involve the collecting of water on the Utah Copper boundary line or property line. Mr. Crocker's testimony as I remember it was that he was going up above the railroad fill and collect the water; that would be some 200 or 300 feet westerly of the property line. The exhibit shows that. (Tr. 2273) To begin with, the plan as outlined on exhibit 61 as testified to by Mr. Crocker would not collect all of the waters that came from the dump of the Utah Copper Company, * * * therefore in my opinion it would not be feasible from that standpoint. The reasons it would not collect all of the water are that it is not at the toe of the Utah Copper dump, it is underneath the dump some distance. (Tr. 2275) And furthermore, the plan as shown goes about seven or eight feet below the bottom of the Dixon Gulch at that point. It is my opinion that the gravels are much deeper than that at that point, and it would be necessary to go considerable depth to shut off the water. That if a shut-off were attempted at that point it would be necessary to put in considerable concrete or some other such construction in order to dam up the water and back it up to go into this tunnel.

I also believe that the water is spread out over considerable area at that point and it would be necessary to extend the wings way up on the side hill, cutting through all of the placer gravels, cutting through the banks of the Bingham-Garfield Railway fill, because I do not believe, myself, this water that comes down the bottom of that gulch runs right through underneath—entirely underneath the railway fill. I know from my own observation, when the entire waters from that gulch came down and did not go through

the drain tunnel that it did not come out in any one place on the fill. For that reason, I believe it would be necessary to raise up, clear up into the fill.

I also know from my experience in other dumps similarly constructed—when I say dumps this time I mean Utah Copper Company dumps, not railroad fills—that the waters do not always flow along the bottom of them. (Tr. 2276) The waters percolate laterally as well as perpendicularly downward; I have observed that in half a dozen instances where that condition exists. Of course I do believe that outside of the waters that accumulated below this point, all of the water could be collected at this location as given by Mr. Crocker. The waters, however, that seep below that point, could not be collected; I know I would never recommend a thing like this being done, because you would never know when you were going to be through spending money on it. It would be a very difficult thing to maintain, and expensive to construct originally. I don't believe anyone after making a study and knowing the conditions would ever recommend such a construction as here proposed.

Counsel attempt to make much of their cross examination of Mr. Goodrich in the early stages of the case wherein Mr. Goodrich expressed the opinion that another tunnel could have been driven for the collection of these copper solutions at a cost of eight or ten thousand dollars, and then described such diversion facilities as "being across Hays ground," and as occupying "practically the entire width of Tract D."

(Tr. 385) Mr. Goodrich did not express an opinion as to the cost of maintaining such facilities. The defendants' proposal had not been made at that time. This was simply a fishing excursion by counsel to pump the witness before divulging their plan, and on that ground plaintiff's objection was sustained to further cross examination of that character. Mr. Goodrich was testifying to a facility constructed upon the *defendants'* premises, but even as to such a tunnel this witness said:

> From my understanding of the word feasible, it would not. Such a tunnel could be constructed, I presume, if anyone had the money and time and inclination to do work of that kind.

and then counsel asked him if a tunnel could not have been constructed from Markham Gulch to collect the waters of Dixon Gulch, and Mr. Goodrich replied:

> A. Yes sir, it would be possible to drive a tunnel from Salt Lake City through the hill too. Marham Gulch is over here. The Utah Copper operations contemplate the filling of Markham Gulch also and the tunnel suggested by you, Mr. Rich, I presume would go through in Markham Gulch below the steel bridge and drive through the mountain across the Hays ground into Dixon Gulch.
>
> Q. As a matter of fact the tunnel would not need to go but very little beneath the base of your fill, wouldn't it?
>
> A. I don't know the tunnel you are talking to, it might be ten feet and it might be ten thous-

> and feet. It is such an improbable suggestion I would like to know more about what your idea is in answering it.

and then the court stopped further examination of that character as not proper cross examination.

The costs of producing copper by this process of precipitation are not in issue here and no testimony has been introduced upon that subject. Counsel volunteer conclusions with relation to such costs concerning which they have neither knowledge nor information. The statement at page 121 of their brief that "practically the only cost * * * aside from the slight expense of precipitation, would be the eight or ten thousand dollar * * * cost"—original cost, not maintenance— of defendants' proposed substitute facility. If counsel's volunteering of testimony is to become the vogue, we will say for counsel's information that at the present price of copper plaintiff's production of copper by its precipitation process cannot be otherwise than at a necessary financial loss to plaintiff, although there be no more investment in the Dixon Gulch diversion facility than the sum of $500.00.

If the trial of this case has been prolonged and has compelled the employment of technical witnesses at great expense, defendants produced that result. When plaintiff rested its case there were only 148 pages of testimony upon plaintiff's direct examination. That

was plaintiff's case. A glance at the record will fix the responsibility for this expensive litigation.

Therefore, the evidence in this case is that it is necessary that plaintiff take the whole Tract D because at certain seasons of the year and perhaps at all seasons a part of the copper solutions from plaintiff's dumps find their way down Dixon Gulch into and through the railroad fill upon that tract, seeping and percolating from the fill to the surface and the bedrock beneath, thence into the bottom of the gulch and down to Tract C and plaintiff's intake. We trust it is apparent from the evidence in this case that the only practical way in which to collect the copper waters from the plaintiff's dumps in Dixon Gulch is that plaintiff has employed, i. e., their collection at the narrowest point in the gulch, being at the toe of the railroad fill. Copper water seeping and percolating or flowing laterally through the dumps and fill easterly of the wings, raises, tunnels, etc., defendants have suggested, would be lost by any other method of collection or diversion. Also defendants' suggestion is impracticable because both construction and maintance would be too expensive and because it could not be presently ascertained at what depth beneath the natural surface upon which the dumps rest bedrock could be reached at the boundary line between the respective properties of the plaintiff and defendants. No doubt, as the defendants' witness Crocker testified, bedrock would be reached somewhere by the

tunnel he proposed, but where even he could not hazard an opinion. Plaintiff is not required to accept such a substitute by any law with which we are familiar.

This is not one of the rare and exceptional cases wherein the proposed taking would be unreasonable or oppressive, but is squarely within the rule stated in 2 Lewis Eminent Domain, (3d Ed.) § 604, p. 1068, as follows:

> It may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. Except as specially restricted by the legislature, those invested with the power of eminent domain for a public purpose, can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts.

(G)

Point

The court below did not err in awarding costs to plaintiff.

Plaintiff's memorandum in accord with which costs were taxed below will be found at page 4073 of the judgment roll. It will be observed that no items were included to cover filing fees of any character nor the service of summons or other papers, nor annual premiums upon the surety bond required of plaintiff upon the order for immediate occupation, but that instead the only costs taxed were witnesses' per diem and mileage

necessitated by defendants' effort to obtain a judgment in their favor upon the issue of title to the copper solutions, an issue that defendants, not the plaintiff, injected into this suit. Defendants' counsel at the outset made it very clear that, in their conception of this suit, it was merely a title action. The following is an excerpt from a discussion between court and counsel: (Tr. 11 to 18).

> MR. PARSONS: It is my understanding that the hearing will proceed and we will be limited as your Honor will be limited to the three statutory questions.
>
> MR. RICH: Do I understand we will be deprived of a jury trial on the question of determining title?
>
> * * *
>
> MR. PARSONS. My notion about this is our opponents are entitled to a jury trial only upon one question, that is the question of damages, the value of the right-of-way and the damage to the balance of the larger tract due to the taking. The question of the title to the water I think goes to our right to condemn. That question must be determined by the court. If we do not own that water I do not know very well how we could take theirs.
>
> * * *
>
> MR. PARSONS: It is our intention to introduce evidence upon the three preliminary questions provided by statute for the determination of the court. I think we enumerated those this morning, so you know what ones I refer to.
>
> MR. RICH: You indicated that title was one of them?

MR. PARSONS: Our right to condemn.

MR. RICH: Your right to condemn, but the extent of condemnation, that is, the title to this water is the thing that is, as counsel says, and as I have said, the paramount issue here. That is not one of the three things, at all.

* * *

So far as the three things here are concerned, they don't amount to anything, absolutely don't amount to anything,

Again upon the occasion of defendants' motion for non-suit (Tr. 740), defendants' counsel defined the character of this suit as follows:

> This suit is not a condemnation suit, but is a suit to obtain title to property. There is no question about that, at all.

That issue the defendants injected into this case and therein failed. Plaintiff in this action has not condemned, and cannot be made to condemn, copper waters or solutions, and consequently cannot be subjected to a judgment for the value of such waters or solutions. Plaintiff has been consistent always in its position that it seeks no waters or solutions, and cannot be made to take any waters or solutions it does not already own. The judgment against plaintiff can be only the amount stipulated. It is not buying copper waters or solutions.

Defendants resist the taxation of costs against them on the ground that in a condemnation suit, al-

though it be as they define it, merely "a smoke screen" (Tr. 740) to a title action, they are at liberty to inject into the issues and to try out any fantastic theory not germane to the action, of which they may conceive, and although completely defeated, nevertheless tax against plaintiff the costs they have thereby incurred, that were it not so, defendants would be deprived of the protection Section 22 of Article I of the Constitution of Utah is designed to afford. The constitutional provision was not designed to secure to an unsuccessful litigant in a title action the costs incurred by him in unsuccessfully trying out groundless claims of title. Neither constitution nor statute was framed for the purpose of permitting an unsuccessful claimant to subject his successful adversary to the expense not only of defending litigation brought by the first, devoid of merit, but also to the payment of the costs the first had incurred in trying out his erroneous theories, in other words, to permit the unsuccessful party to experiment at the risk and certain expense of the successful party to that litigation!

The costs taxed were not incurred in ascertaining the amount of the compensation to which the owner was entitled by reason of the taking; that amount was stipulated at the sum of $500.00, which was the amount offered defendants by plaintiff before the suit had been commenced. (Tr. 3874) Had the defendants not conceived the idea of resorting to this effort to quiet in

them title to the copper solutions on and above bedrock from plaintiff's dumps in Dixon Gulch, this suit no doubt would never have been instituted. Upon the matter of compensation for the premises condemned and damages resulting from the taking, the parties were never apart. Plaintiff always insisted, and the pleadings clearly show, that plaintiff was condemning no waters or copper solutions, and that if permitted to take its judgment as prayed defendants by a subsequent action, could have enjoined plaintiff's diversion of solutions or waters of which plaintiff was not the owner. Defendants, however, elected to and did by their several answers, make the effort in this condemnation suit, to try title to the copper solutions plaintiff proposed to collect. Had defendants not so elected and had they not instituted another action against this plaintiff to quiet title in them to these solutions and for injunctive relief, as defendants might properly have done, and have been unsuccessful in that action as here, of course this plaintiff would in that action have been allowed its costs. The case at bar indeed became a title suit, but it was the defendants who made it such. The defendants failed, and notwithstanding, they seek not only to require the successful party to pay its own costs, but theirs as well. That is straining the constitutional provision too far.

In other words, the issue that was tried in this case was not one in condemnation, but instead one of

title to copper solutions for the collection and diversion of which plaintiff sought to exercise the right of eminent domain. The Colorado Supreme Court emphasizes the distinction in Haver vs. Matonock, 75 Colo. 301, 225 Pac. 834. The plaintiff in that case sought to condemn a right of way for a pipe line for the conveyance of water from a stated source for the irrigation of his land, but the defendant answered the complaint and denied that there was any water available for plaintiff at that source, and hence denied that there was any necessity for the exercise of the power of eminent domain. The trial court dismissed the proceeding accordingly, but upon appeal the supreme court held:

> We cannot hold that the question of necessity involves the question whether there is any water in existence which petitioners can use. * * * The views above expressed are supported by the langauge of the opinion in Gibson v. Cann, 28 Colo. 499, 66 Pac. 879, where it was said that—
>
> > 'In determining the question of necessity for taking lands sought to be condemned for right of way for irrigating ditches, * * * the question as to * * * what petitioner may be able to accomplish in the way of obtaining water which can be utilized through his proposed ditch, * * * cannot be inquired into.'
>
> In Schneider v. Schenider, 36 Colo. 518, 86 Pac. 347, this court, in considering the question of necessity for the construction of a ditch for

which it was sought to condemn a right of way, said:

> 'As to whether or not there is sufficient water for plaintiff's use, or as to whether or not the plan is a practicable or feasible one, is a matter which cannot be determined in a proceeding of this character—(citing Gibson v. Cann, supra).
>
> 'The various questions which may arise as to the right to appropriate the water cannot be here determined. * * *'

Further on, the court said:

> 'Appellant contends that a nonsuit should have been granted because plaintiff failed to prove that she was the owner of a water right or had made an appropriation of water. We are not inclined to concede this contention. An action under the Eminent Domain Act cannot be converted into an action to quiet title. So far as it is concerned it must remain an action in eminent domain, and no issue can be injected into the case which will change its character. D. P. & I. Co. v. D. & R. G. R. R. Co., 30 Colo. 215.'

The evidence presented by defendant before the commissioners for the purpose of disproving necessity was not, for reasons above indicated, relevant to the question of necessity, as that term is used in proceedings of this kind. There was, in fact, no competent evidence to show absence of necessity. It was error not to set aside the findings of the commission, because there was no evidence on which the findings could be based.

> The judgment is reversed, and the cause remanded, for further proceedings not inconsistent with the views herein expressed. (225 Pac. 834-5)

To the same effect is Public Service Co. vs. City of Loveland, 79 Colo. 216, 245 Pac. 493. That plaintiff did not object to the trial in this action of the issue of title raised by defendants renders the issue no less distinct, no less separate and apart from that of eminent domain, no less an issue wherein the defeated parties should in good conscience and in law suffer a judgment against them for taxable costs.

Section 7347 Compiled Laws of Utah 1917 upon this subject is as follows:

> Costs may be allowed or not, and if allowed, may be be apportioned between the parties on the same or adverse sides, in the discretion of the court.

That section is not meaningless.

In Truckee River General Electric Co. v. Durham, 38 Nev. 311, 149 Pac. 61, the court had the following to say upon this subject:

> Appellant complains of the order of the court in assessing all of the costs of the proceedings to it. It is our opinion that in assessing costs in these proceedings the court should take into consideration the reasonableness of the valuation placed upon the land by the defendant in his answer and the amount of damages claimed. If the demand is so unreasonable as to justify

> a fair-minded person in litigating the question, small consideration should be paid to his request for judgment for the costs which accrued after the filing of the answer in the case.

The defendants in their answer alleged they were damaged by the taking in an amount "upwards of $200,000.00," but before this suit was instituted plaintiff offered them $500.00 in full of the value of the premises taken and all damages sustained by them, and at the conclusion of this extended litigation the defendants stipulated for a judgment for that identical amount. Defendants still insist that the copper solutions are worth "upwards of $200,000.00," but plaintiff is not seeking to condemn copper solutions, could not do so in this action even if it wanted to, and could not in this action be subjected to a judgment on that account. The stipulated amount of $500.00 covers the premises taken and the damage sustained. Plaintiff seeks nothing else. The nature of this suit cannot be changed by the purported defense alleged in the answer to gratify defendants' desire for a large judgment. Defendants have received the full amount for which they stipulated, hence an adequate compensation for all property taken and the damages sustained, including all costs of suit upon that issue, and there can be no violation of constitutional provisions by requiring defendants to pay the taxable costs resulting from their unsuccessful effort to quiet title in them to other prop-

erty beyond the scope of this suit, the taking of which would be impossible through or by means of this suit.

Determination of title to the copper solutions was not a necessary incident of this suit—no more so than an inquiry into the precise nature of plaintiff's title in or to its dumps in Dixon Gulch, nor into the many other matters the courts have excluded from consideration in condemnation suits.

> In re Cedar Rapids, 85 Ia. 39, 51 N. W. 1142;
> Mercer Co. v. Wolff, 237 Ill. 74;
> Chicago v. Sanitary Dist., 272 Ill. 37, 111 N. E. 491;
> Dallas v. Hallock, 44 Ore. 246, 75 Pac. 204;
> State v. Superior Ct., 42 Wash. 521, 85 Pac. 256;
> Tenn. Coal, Iron & R. R. Co. v. Birmingham So. Ry. Co., 128 Ala. 526, 29 So. 455;
> Santa Ana v. Brunner, 132 Cal. 234, 64 Pac. 287;
> Richland School Tp. v. Overmeyer, 164 Ind. 382, 73 N. E. 811;
> Kansas etc. Ry. Co. v. N. W. Coal & Min. Co., 161 Mo. 288, 61 S. W. 684, 84 Am. St. Rep. 717, 51 L. R. A. 936;
> Caretta Ry. Co. v. Va-Pocahontas Coal Co. 62 W. Va. 185, 57 S. E. 401;

This suit was one to condemn Tract D on and above bedrock as a conduit by means of which to convey to plaintiff's intake on Tract C the copper solutions from the dumps above in Dixon Gulch, and the parties stipulated the value of the premises taken and the damages to result from that taking. Had defend-

ants not elected, and the plaintiff not permitted defendants, to try out in this action the question of title to the copper solutions flowing at the so-called Hays Spring, the condemnation suit would have been completely disposed of by that stipulation. If defendants thereafter concluded plaintiff was taking defendants' copper solutions, the judgment in the condemnation suit would not have been res adjudicata upon the issue of title, because the latter was not within the issues in the condemnation suit. No constitutional provision is violated by the taxation of costs in favor of the successful party to an action to try title, and accordingly no error was committed by the court below in taxing such costs upon the trial of that issue below. The issue remains the same whether injected into a condemnation suit or tried in a separate action.

Somewhat this situation arose in the case of Matter of Cortland, etc., Horse R. R. Co., 98 N. Y. 363, wherein the facts were these: one railroad company attempted to condemn a crossing over the tracks of another railroad company. The two companies were represented by eminent counsel and the case was long and bitterly fought upon the question of the right to condemn, the matter of damage being, as here, of no especial moment. The court allowed costs in favor of the condemner, holding that no constitutional provision had been violated by such award because the defendant had not been deprived of a fair compensation for what was taken.

The quantum of damage had not been the issue tried and consequently the case of Matter of Walsh, 94 N.Y. 287, did not apply. The court held:

> The application in this case was a special proceeding (Code Civ. Pro., §§ 3333, 3334), and according to the general rule the costs were in the discretion of the court (§3240). The claim that the proceeding having been instituted by the petitioner to acquire a crossing over the track of the appellant, the latter could not be compelled to pay the cost of the proceeding, under the decision in Matter of Walsh (94 N. Y. 287), is not well founded. * * * The case shows that the appellant in substance declined to permit the petitioner to cross its tracks, and when the commissioners were appointed, the question litigated before them related to the place and manner of crossing, whether it should be at, or above, or below grade, and not at all to the question of compensation, as to which no evidence was given. The points of crossing considered by the commissioners, and as to which the evidence related, were a crossing on the highway and one outside of the highway but near to it, and there was no practical difficulty in giving evidence bearing upon the amount of compensation, if that question was deemed important.
>
> Upon the facts presented to the court on the motion in respect to costs, the court would have been justified in finding that the appellant, on the hearing before the commissioners, waived all claim for compensation beyond nominal damages. The litigation, from the first, has been most determined and persistent; on the one side to secure, and on the other to prevent a crossing as

> desired by the respondent. There is no constitutional right involved in the order of the Special Term imposing the costs of the litigation upon the appellant, and we cannot review its discretion. * * *

Costs of the condemning party on appeal by the property owner may be allowed against the owner.

> City of Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468;
> Town of Redmond v. Perrigo, 84 Wash. 407, 146 Pac. 838.

CONCLUSION

As this question has been passed upon adversely to the defendants by two judges of the court below, first, by the late Morris L. Ritchie, and then the Honorable Roger I. McDonough, and is now brought here by the defendants for a third consideration.

One is not greatly impressed by defendants' resistance, the only object of which is to enrich themselves by the seizure of plaintiff's copper solutions, an artificial product resulting from plaintiff's industry and investment, from the conduct of plaintiff's leaching operations upon plaintiff's premises, a product every ingredient of which is the absolute property of the plaintiff. Defendants seek the aid of this court by which to accomplish that seizure. They make a very strenuous effort to persuade this court to deny plaintiff the right to convey its solutions across defendants' premises, that

defendants may appropriate them. They urge upon this court authority to the effect that "when the oil left the land of the operators it became abandoned property," (page 39 Appellants' Brief) defendants claiming these solutions upon that theory, yet by the same effort seeking to prevent plaintiff's condemnation sought by this action whereby to avoid such an abandonment. If plaintiff be permitted to condemn the easement sought, the authorities cited by defendants will be in no manner relevant. As did the defendants in the case of Utah Copper Co. v. Montana-Bingham Consolidated Mining Co., so do the defendants in the case at bar, strive strenuously to defeat plaintiff's effort to condemn the easement necessary to prevent the escape and loss of plaintiff's solutions, thus to insure plaintiff's abandonment of its solutions and the successful consummation of defendants' effort to acquire them. The defendants, willfully it seems to us, refuse to admit the purpose for which this action is brought. If plaintiff be permitted to condemn, plaintiff's solutions will be saved to plaintiff, not abandoned by it. In their effort to defeat the condemnation and thereby accomplish the abandonment defendants require, defendants assume the abandonment the maintenance of this suit will avoid, a false assumption upon which defendants attempt to erect a defense.

Pending the action the copper solutions have been saved from abandonment by order of court putting

plaintiff in possession for the purpose of conveying plaintiff's copper solutions across Tract D to and into plaintiff's intake, by which order plaintiff's boundary line was, pending the action, extended across Tract D to and including plaintiff's intake. These solutions are concededly plaintiff's at plaintiff's boundary line, and if plaintiff be permitted to condemn this channel across Tract D to plaintiff's intake, plaintiff's boundary line will cease as such and those solutions will have flowed, seeped or percolated along the course wherein plaintiff shall have acquired the right, title and easement so to conduct them; they will never have passed beyond plaintiff's estate, will never have escaped from plaintiff's possession, will never have ceased to be captured, collected, impounded and preserved by plaintiff within this well-known and defined channel to plaintiff's intake, a channel as well known and clearly defined as the very pipe line into which the solutions flow at plaintiff's intake and by which they are conveyed to plaintiff's precipitating plant. Predicated as it is upon the erroneous assumption that plaintiff's solutions have been abandoned, defendant's argument has no relevancy whatever to the case at bar.

The judgment below should be affirmed.

Respectfully submitted,

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and Respondent.